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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 89

ALTON J. LEMON, ET AL., *Appellants*,

v.

DAVID H. KURTZMAN, ET AL., *Appellees*.

On Appeal From the United States District Court for the Eastern District of Pennsylvania

BRIEF FOR APPELLEE SCHOOLS

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OTHER AUTHORITIES:

Billington, The Protestant Crusade—A Study of the Origins of American Nativism (1938) 11
Burns, *The Control of Government Expenditures,* Tax Review, Vol. XXXI, January 1970, p. 3 14
Choper, *The Establishment Clause and Aid to Parochial Schools,* 56 Calif. L. Rev. 260, 297-298, 313 (1968) 36, 43-44
Conant, The American High School Today, 47, 69-71 .. 28
Curran, Catholics in Colonial Law (1963) 11
Davis, *Standing: Taxpayers and Others,* 35 U. of Chi. L. Rev. 601, 617 (1968) 58
Donoghoe, Foreign Languages and the Schools: A Book of Readings, 6 28
Fehr, *Mathematical Education for a Scientific, Technological and Industrial Society,* Mathematics Teacher, November 1968, p. 665 28
Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Col. L. Rev. 527, 529 (1947) 26
Freund, *Public Aid to Parochial Schools,* 82 Harv. L. Rev. 1680 (1969) 36
Giannella, *Religious Liberty, Non-Establishment and Doctrinal Development,* Part II, 81 Harv. L. Rev. 513 (1960) 36

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Hutchins, *The Future of the Wall*, in The Wall Between Church and State (Oaks ed.) (1963), pp. 17, 22, 25 36

Katz, Religion and American Constitutions, 73-75 (1964) 36

Kauper, Religion and the Constitution (1964), pp. 112, 113 36

Kurland, *Politics and the Constitution: Federal Aid to Parochial Schools*, 1 Land and Water Law Rev., 475, 493, 494 (1966) 36

Landynski, *Governmental Aid to Nonpublic Schools*, 36 Social Research No. 3, 333, 344, 345, 350, 353 (Autumn 1969) 36, 37

Maynard, The Story or American Catholicism, Vol. II, (1960), pp. 255-281 11

Meiklejohn, *Education Cooperation Between Church and State*, 14 Law & Contemp. Prob., 61, 71-72 (Winter 1949) 36

Myers, History of Bigotry in the United States (1943), pp. 140-295 11

Rickover, Education and Freedom, 154 28

Schwarz, *Religious Liberty, Non-Establishment and Doctrinal Development—a Reply to Professor Giannella*, 81 Harv. L. Rev. 513 (1968) 36

Stokes, Church and State in the United States, Vol. 1, pp. 830 *et seq.* (1950) 11

Valente, *Aid to Church Related Education—New Directions Without Dogma*, 55 Va. L. Rev. 579, 599 (1969) 36

Van Alstyne, *Constitutional Separation of Church & State: The Quest for a Coherent Position*, 57 Am. Pol. Sci. Rev. 865; 880-882 (1963) 14

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Testimony of M. DeWolfe Howe, Senate Document 29, 87th Cong., 1st Sess., 50 (1951) 36

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Committee for Economic Development, Fiscal Program for a Balanced Federalism, New York, 1967, pp. 9-10 14
Congressional Record, Vol. 115, p. 717, January 15, 1969 14
Message of the President of the United States to Congress on Education, March 3, 1970, 91st Congress, 2d Session, H.R. Document 91-267, 9 12
Moore's Federal Practice, Vol. 2A 10.08 (1968) 21
New York Times, Assembly Votes Textbook Loans, May 12, 1965 49
News Information Release, Governor's Office, Commonwealth of Pennsylvania, June 19, 1968 29
News Release, Department of Public Instruction, Commonwealth of Pennsylvania, November 8, 1968 .. 29
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Senate Committee on Government Operations, Subcommittee on Inter-Governmental Relations, The Catalog of Federal Aids to State and Local Governments, Committee Print, April 15, 1964 and Supplement, January 4, 1965 14
The Society of State Directors of Health, Physical Education, and Recreation, The School Programs in Health, Physical Education and Recreation—A Statement of Basic Beliefs 28
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BRIEF FOR APPELLEE SCHOOLS

OPINION BELOW

The majority and dissenting opinions of the three-judge District Court for the Eastern District of Pennsylvania are reported at 310 F. Supp. 35 (A78).[1]

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[1] References in parentheses are to the pages of the Appendix.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

Constitution of the United States, article III, Section 2:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . ."

Pennsylvania Nonpublic Elementary and Secondary Education Act, June 18, 1968, P.L. ——, No. 109; Pa. Stat. Ann. tit. 24 § 5601, *et seq.*[2]

QUESTIONS PRESENTED

The Pennsylvania General Assembly, for the declared public purpose of promoting the secular education of children in Mathematics, Modern Foreign Languages, Physical Science, and Physical Education, has enacted a statute whereby the Department of Public Instruction, pursuant to quality, secularity and fiscal controls, reimburses nonpublic schools for the audited partial cost of such instruction, where such schools are schools wherein the requirements of the compulsory attendance law may be met.

This appeal poses the following questions:

1. Does the Act violate the Establishment Clause of the First Amendment?

2. Does the Act violate the Free Exercise Clause of the First Amendment?

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[2] This Act has been amended in two respects which do not affect the issues raised in this litigation. (See Act No. 86, March 25, 1970, P.L. ——; and Act No. 224, July 31, 1970).

3. Do the organizational Appellants have standing to bring this action?

4. Do the individual Appellants have standing to bring this action under the Free Exercise Clause of the First Amendment or the Equal Protection Clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

1. The Statute Involved

As revealed in the Act's statement of legislative finding and declaration of policy, one out of every five elementary and secondary school pupils in Pennsylvania attends a nonpublic school. There are eleven hundred eighty-one nonpublic schools in the state which are now under contract with the Commonwealth pursuant to Act 109 of 1968 (Pennsylvania Nonpublic Elementary and Secondary Education Act). Located in 55 of Pennsylvania's 67 counties, they have a total pupil population of 535,215 children.[3]

The purposes of the Act are set forth in its title, statement of finding, and declaration of policy. In these, the General Assembly stressed that the Commonwealth is faced with an educational crisis; that the services of Pennsylvania's nonpublic schools are essential to meet that crisis; and that unless assistance to such schools is afforded,

> ". . . an intolerable added financial burden to the public would result, as well as school stoppages and long term derangement and impairment of education in Pennsylvania . . ." (Sec. 5602(6)).

The General Assembly also declared:

> ". . . the governmental duty to support the achieving of public welfare purposes in education may be in part fulfilled through government's support of those

[3] Most of these children attend Catholic schools.

> purely secular educational objectives achieved through nonpublic education". (Sec. 5602(3))

and that

> ". . . hazard to the education of children [occasioned by the overall education crisis] may be substantially reduced and all education in the Commonwealth improved through the purchase herein provided of secular educational services from Pennsylvania nonpublic schools." (Sec. 5602(6)).

The Act provides that the Commonwealth may enter into arrangements with nonpublic schools for reimbursement to them of part of the cost actually incurred by them in providing instruction in the four secular subjects specified, namely, Mathematics, Modern Foreign Languages, Physical Science, and Physical Education. The Act prohibits the blending or interwining of secular and sectarian instruction in these subjects by providing that instruction in such courses

> ". . . shall not include any subject matter expressing religious teaching, or the morals or forms of worship of any sect." (Sec. 5603(3)).[4]

A "nonpublic school" is defined to mean a school, other than a public school, wherein a resident of Pennsylvania may legally fulfill the requirements of the Pennsylvania compulsory attendance law.

By statutory definition "actual cost" for which reimbursement may be made is limited exclusively to three items of direct expense: textbooks, instructional materials, and teachers' salaries. Following the established pattern

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[4] This critically important provision is omitted from discussion in the Brief for Appellants and even from quotation or reference in the dissenting opinion below.

of governmental support of other welfare services,[5] payment is made *after* services are rendered.

The Act thus imposes safeguards in three essential aspects: (1) limitation to the four markedly non-value related subjects (2) quality controls, *viz.*, the requirements (Section 5604) of (a) state approval of the textbooks in question (b) state-approved standardized testing (c) teacher certification; and (3) fiscal controls.[6] The funding of the Act does not come from general taxation and is derived exclusively from a special fund which is not, and has never been, utilized for support of the public schools. Section 5606 expressly prohibits using money raised for the support of the public schools in the Commonwealth to pay for services under the Act, or even for expenses in connection with administration of the Act.[7]

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[5] See, *e.g.*, *Schade* v. *Allegheny County Inst. Dist.*, 386 Pa. 507 (1956). While the Act employs the familiar arrangement known, in child care and sick care support, as "purchase of service", this mechanical device of support is not constitutionally critical. Purchase of service, with its feature of reimbursement following performance, is significant only as a device to better assure that performance is according to prescribed standards.

[6] "Any nonpublic school seeking such reimbursement shall maintain such accounting procedures, including maintenance of *separate funds and accounts* pertaining to the cost of secular educational service, as to *establish that it actually expended in support of such service an amount of money equal to the amount of money sought in reimbursement.* Such accounts shall be subject to audit by the Auditor General." (Emphasis supplied). (Sec. 5607(a)).

[7] The Act provides only for reimbursement, and the nonpublic school cannot, as the dissenting opinion below stated, designate "the portions of is curriculum for which it wants assistance." See, *Lemon* v. *Kurtzman*, 310 F. Supp. 35, 50 (Hastie, C.J., dissenting) (E.D. Pa. 1969). (A102).

This Act became effective on July 1, 1968,[8] and is now in its third year of operation.

2. The Proceedings Below

On June 3, 1969, Appellants (the Plaintiffs below) brought this action, naming as defendants the Commonwealth Secretary of Education,[9] the Commonwealth Treasurer, and seven nonpublic schools.[10] The action was brought as a class action, the named schools being sued as representative of (1) all sectarian educational institutions in the Commonwealth of Pennsylvania (2) all educational institutions in Pennsylvania which (allegedly) discriminate against persons by reason of race or religion, "the number of such sectarian and other educational institutions being too numerous to be conveniently joined as defendants in this suit." (Complaint, ¶ 7, (A11)).

The Complaint alleged in three counts that the Act violates the Establishment, Free Exercise and Equal Protection Clauses of the Constitution and sought an injunction against payments made thereunder.

On July 25, 1969, Appellee schools filed the following motions material to a disposition of this appeal: (1) Motion Under Rule 23(c), (2) Motion to Dismiss Complaint For Failure of Plaintiffs to Have Standing to Sue, and (3)

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[8] Thereafter the Department of Public Instruction issued *Rules and Regulations for Implementing the Pennsylvania Nonpublic Elementary and Secondary Education Act.* These were before the court below, at its own request as well as by stipulation of counsel. For the convenience of the Court, counsel have supplied official copies of these to the Clerk of the Court.

[9] The title, prior to July 23, 1969, was "Superintendent of Public Instruction".

[10] The court later granted leave to the Pennsylvania Association of Independent Schools to intervene as a party defendant for purposes of presenting argument on the Defendants' Motion to Dismiss.

Motion to Dismiss Complaint for Failure to State a Claim Upon Which Relief Can Be Granted.

After filing their Rule 23(c) motion for a hearing to establish that the seven named defendant schools were not representative of the 1,181 nonpublic schools participating under the Act, Appellants filed their Answer thereto stating:

> "Plaintiff(s) agrees that the action will not be maintained as a class action under Rule 23(c) of the Federal Rules of Civil Procedure." (A42).

On August 20, 1969, the court entered the following order:

> "4. In the light of plaintiffs' 'Answer to Defendants' Motion under Rule 23(c)', IT IS FURTHER ORDERED (a) that the within action shall not be maintained as a class action . . ." (A54).

Notwithstanding the foregoing actions, Appellants subsequently persisted in pressing their action as an attack upon the validity of the Act in all of its applications. See Plaintiffs' Memorandum on the Necessity of a Three-Judge Court, (A58-A63); Excerpt From Oral Argument, (A64-A65). Thus, Appellants limited their claim to one of unconstitutionality of the statute on its face as to all schools and not merely with regard to a particular school or class of schools.

After briefing and argument, the court ruled as follows:

(a) None of the organizational Appellants had standing to sue.

(b) None of the individual Appellants had standing to sue under the Equal Protection Clause.

(c) Only one of the individual Appellants (Lemon) had standing under the Establishment Clause.

(d) All individual Appellants had standing under the Free Exercise Clause.

(e) The Act does not violate the Establishment or Free Exercise Clauses. Respecting the Establishment question, the court held the Act to have a secular legislative purpose and no primary effect that advances or inhibits religion. 310 F. Supp. 35, 45, 47 (E.D. Pa. 1969) (A91, A92, A95). Respecting the Free Exercise question the court held that the Act does not coerce anyone in the practice of his religion. *Id.* at 48-49. (A99).

The dissenting judge found that no Appellant had standing under either the Equal Protection or Free Exercise Clauses. He confined his opinion to Appellants' allegations with respect to the Establishment Clause and held that the motion to dismiss should be denied.

SUMMARY OF ARGUMENT

Commonly with the other key population states, the Commonwealth of Pennsylvania, from 1960 forward—experiencing the combined effects of financial stress, rise in school population and demands for quality education—was faced with an increasingly enveloping crisis. For schools enjoying total public support the statewide crisis was serious. For the State's nonpublic schools—dependent solely on personal contributions—it was threatening. The threat to the latter was equally a threat to the former because, particularly in the great urban centers of the State, nonpublic (largely parochial) schools had long borne the critically important burden of educating a substantial percent of Pennsylvania's total school population. In 1968 the General Assembly of Pennsylvania enacted the legislation here challenged as a response to its public-nonpublic educational crisis.

That legislation, Act 109 of 1968, provides Commonwealth support for four areas of instruction in the non-

public schools: Mathematics, Modern Foreign Languages, Physical Science, and Physical Education. The mode of support (purchase of service) was patterned on long-tried Pennsylvania programs in child care and health care. The Act, now in its third year of operation, has been a contributing force in helping to stem the tide of educational deterioration in the State.

Appellants attack the Act, under the Establishment and Free Exercise Clauses of the federal constitution, because of its inclusion of religiously affiliated schools. They also allege that the Act is violative of the Equal Protection Clause because, so they say, it has an effect of promoting segregation. They attack the Act on its face and not in its application.

The prior applicable decisions of this Court sustain the validity of Act 109. In *Board of Education* v. *Allen*, 392 U.S. 236 (1968), the Court, subsuming to its holding all its prior Establishment Clause decisions, set forth the test applicable to legislation challenged under the clause. The legislation, to withstand such challenge, must have a "secular legislative purpose" and a "primary effect that neither advances nor inhibits religion". The facts of this case, as set forth in the Statement of the Case and analyzed in Point III of this brief (pp. 25-30) amply demonstrate that Act 109 serves a vital secular and public purpose in Pennsylvania.

Moreover, the Act, seen in the light of this Court's decisions in *Allen, supra*, and *Walz* v. *Tax Commission*, — U.S. —, 25 L. Ed. 2d 697 (1970), cannot be said to have a primary effect that advances religion. Appellants elaborate their Establishment Clause argument with the claim that, under the teaching of *Walz*, Act 109 should be held as creating an unconstitutional "entanglement" between churches and the State, leading to "divisiveness" in the community and the oppressing of religion. They thus misread the Act, the decision in *Walz*, and the facts of life

in the United States where myriad successful governmental programs, through sustained and detailed administrative relationships, provide funding for worthy secular objectives carried out by private (including religiously affiliated) agencies. These have long enjoyed public confidence. They have neither bred division nor inhibited religion.

Under settled rulings of the Court, it is clear that the Act does not deny the free exercise of his religion to anyone; further, that no Appellant has Free Exercise standing. With respect to Appellants' claim of a denial of Equal Protection, no Appellant has standing to sue under the Equal Protection Clause because none asserts a requisite personal stake in the outcome of the controversy.

ARGUMENT

I. THE NATIONAL SIGNIFICANCE OF THIS CASE

The Educational Crisis. Plainly, a crisis exists in the nation respecting the educating of her youth. Public school budgets everywhere are at an all-time high but must compete with the general rise in budgetary demands of all other governmental services. While in every corner of the nation inflation and taxation are the commonest subjects of discussion, concern for education—a concern related to the very stability of the society—is the most profound concern now felt by most citizens.

A central factor in the national educational crisis is the nonpublic school. 6,400,000 children are enrolled in nonpublic (mostly parochial) schools—almost one out of every ten school children in the nation. In the major industrial states the proportion is higher—in Pennsylvania, Massachusetts, Illinois and New Jersey it is 22 per cent; in New York, 21 per cent; in Ohio, Michigan and Connecticut, 15 per cent. The percent of nonpublic school enrollment is

critical in the ten metropolitan regions of highest population concentration:

New York-Newark-Jersey City	28%
Los Angeles-Long Beach	13%
Chicago-Gary	32%
Philadelphia	34%
Detroit	21%
Boston	23%
San Francisco-Oakland	13%
Washington, D. C.	18%
Pittsburgh	29%
St. Louis	29% [11]

While, with respect to parochial schools, this central factor has its roots not only in conscientious choices of citizens but also in a dark history of religious and anti-immigrant exclusion,[12] it is an inescapable fact today, vitally related to the economy of key states and key cities in the nation, and in particular to their Black and Puerto Rican neighborhoods where parochial schools, due to no other factor than the personal dedication of their staffs, have long been a constructive force. The nation's nonpublic schools have, since their beginning, effected great savings to the public. But, as President Nixon pointed out on March 3, 1970:

> "*If most or all private schools were to close or turn public, the added burden on public funds by the end of*

[11] The figures are for elementary school population. It is believed that secondary school figures would not materially change the percentages given. Source: U.S. Bureau of the Census as summarized by Havighurst. (See Supplement A, Part 3).

[12] See, F. CURRAN, CATHOLICS IN COLONIAL LAW (1963); G. MYERS, HISTORY OF BIGOTRY IN THE UNITED STATES, 140-295 (1943); 1 A. STOKES, CHURCH AND STATE IN THE UNITED STATES, 830, *et seq.* (1950). *See generally,* R. A. BILLINGTON, THE PROTESTANT CRUSADE—A STUDY OF THE ORIGINS OF AMERICAN NATIVISM (1938); 2 T. MAYNARD, THE STORY OF AMERICAN CATHOLICISM, 255-281 (1960).

> *the 1970s would exceed $4 billion more needed for facilities.*" President of the United States, Message to the Congress on Education, March 3, 1970, 91st Congress 2d Session, H.R. Document 91-267, 9. (Emphasis in original text).

This statement could be readily paraphrased in terms of the now imperiled nonpublic schools of Pennsylvania. In 1967 it was found that, in terms of per pupil educational cost alone, the local tax impact of the continuing nonpublic school cutbacks would before long prove intolerable.[13] The public schools, if truly threatened statewide in the crisis which its spokesmen (correctly) claimed it to be engulfed, could not begin to consider taking on substantial added nonpublic school population. Any attempted "phaseout" of nonpublic education in Pennsylvania would plainly encounter impossibility in the end and chaos in the process. For all larger communities in the Commonwealth—with already beleaguered public school systems—there would be no facilities to phase into. The attempt to move substantial nonpublic school populations into public schools would, in those communities, plainly result in administrative disorder, the long-term effects of which would be visited upon administrators, teachers, parents and, most of all, children.

Response to the Crisis. Pennsylvania, as one "social laboratory" among the fifty states[14] considered thoughtfully the problem of the inseparably connected nonpublic-public school crisis and the now evident need to utilize *all* available community resources in meeting that crisis. Following two series of legislative hearings, in which various proposals were advanced and extensive testimony from all interested parties was heard, the General Assembly enacted Act 109 as an express response to the crisis.[15] The

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[13] See Supplement A, Part 2.

[14] See, *Roth* v. *United States*, 354 U.S. 476, 505 (1957) (Harlan, J., concurring).

[15] See Pa. Stat. Ann. tit. 24, § 5602(6).

form of legislation was one having Pennsylvania roots in long-tried child care and sick care statutes in which the state and private (including religious) institutions had enjoyed successful administrative relationships. The Act was one reflection of a growing view at the federal level and in the key population states, that, while it is not lawful for government to support religion, neither is it possible or desirable for it to supplant the voluntary effort in education. Government, in this view, may aid carefully defined secular objectives achieved by private, church-related educational agencies. (See Supplement B, Part 1). Following the enactment by the Congress of the National Defense Education Act, 20 U.S.C. § 445, and the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 241, which recognized the principle of governmental assistance to religiously affiliated schools, states having major nonpublic school populations have written statutes which provide a similar recognition, particularly meaningful in these jurisdictions in relation to their nonpublic-public educational crisis. (See Supplement B, Part 2).

Government as an enabler of voluntarism. The ultimate significance of Act 109 (and thus of this litigation) is not in terms merely of the tax impact of Pennsylvania's nonpublic schools upon that state's educational present and future, but in broad terms of educational freedom, religious liberty and the maintenance of *voluntarism* as essential to a free society.

In our now heavily welfare-oriented society, massive governmental spending is dominant,[16] *and individual men*

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[16] The costs of government having spiraled upward since World War II. Between 1950 and 1968 the school population ages 5-17 increased from 30.2 million to 52.3 million while the expenditures for public education jumped from $5.84 billion in 1950 to $35.51 billion in 1968. *Statistical Abstract*, 1969, 111. Although national government expenditures remained at a high level during the 1955-65 decade, state and local government general expenditures rose at more than twice the rate of the national government's gen-

and women, even when banded together in associations or institutions, no longer possess the economic resources with which to maintain diverse, non-state endeavors in education and welfare. See Van Alstyne, *Constitutional Separation of Church and State: The Quest For a Coherent Position*, 57 *Am. Pol. Sci. Rev.*, 865 at 880-882 (1963).

Education is plainly the most important aspect of voluntarism and that which is most meaningful in terms of a free society. It is vain to imagine that a broad voluntary effort in education, in an America whose life is increasingly dominated by governmental spending, can continue without a measure of public aid. In the absence of such help, all children (except those of the very rich) will in

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eral expenditures. Committee for Economic Development, *Fiscal Program for a Balanced Federalism*, New York, 1967, 9-10. Federal grants-in-aid programs proliferated during the 1960's to the point where Congress found it necessary to publish catalogues of the programs available. Senate Committee on Government Operations, Subcommittee on Inter-Governmental Relations, *The Catalog of Federal Aids to State and Local Governments*, Committee Print, April 15, 1964, and *Supplement*, January 4, 1965. By early 1970 Arthur F. Burns wrote that the number of federal categorical programs of all types exceeded 600. "The Control of Government Expenditures", *Tax Review*, Volume XXXI, January, 1970, p. 3. In his final Budget Message to Congress, President Johnson had noted that between 1964 and 1969 some 60 education measures had been enacted by Congress. *Congressional Record*, Volume 115, p. 717, January 15, 1969. The magnitude of the expenditures is demonstrated by the expansion of the social welfare outlays under public programs. In the depression year of 1935—before the adoption of most of the present programs—the total expenditure for state and federal programs in this broad classification was $6.6 billion. Preliminary estimates of all social welfare expenditures in 1968 was placed at $112.4 billion. *Statistical Abstract*, 1969, p. 274. In 1970 it was stated: "Federal aid to the poor will alone cost $27 billion this year in contrast to $12 billion in 1964. Grants in aid to states and localities will cost about $25 billion in contrast to $15 billion in 1967, $10 billion in 1964 and $5 billion in 1958." "The Control of Government Expenditures", *Tax Review*, Volume XXXI, January, 1970, p. 3.

the near future perforce be educated in public schools. No criticism of public education is implied by the recognition that many citizens desire schooling for their children other than that offered by the state—whether for religious, cultural, intellectual, disciplinary, ethnic, or other reasons. That a choice of such schooling is a fundamental liberty has long been settled by this Court. *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925). Enshrined though it is in legal contemplation, that liberty will be effectually denied when the combined factors of governmental spending, heavy taxation of the person and high educational cost will have left most citizens with no choice but state education. In a society in which the state alone is educator, the state will inevitably tend to become the determiner and teacher of all values by which men live.

There is evidently needed today a balanced role for government in education. In a truly libertarian role, government should foster the public interest not only by providing public education at state expense, but also by affording *partial* "enabling" assistance to private education, limited to secular functions which it performs and with those safeguards necessary in light of community interests.

Act 109 does no more than provide the Commonwealth a role as an enabler of voluntarism in education.

Consequences of the decision in this case. If the peculiarly noncontemporary constitutional proposition which the Appellants herein seek to promote were to be adopted by this Court, a number of important existing statutes aiding education in nonpublic institutions would necessarily be threatened, and their evident effect in ameliorating the critical educational needs of America's swelling urban communities frustrated. Were the Court to adopt Appellants' absolutist position, federal laws involving at least eighty-four educational programs administered by some fourteen departments and agencies of the federal govern-

ment would be placed in jeopardy. (See Supplement B, Part 1). Appellants' fundamentalist view, implicitly attacking church relationship as the essential vice of Act 109, cannot, once it is applied, be contained within a perimeter represented by the facts of this case. Nothing which this Court has so far held lends basis to their view. To the contrary, the teachings of this Court point with unmistakable clarity to the constitutionality of the accommodation to intellectual and religious liberty which Pennsylvania created in Act 109.

II. THE POSTURE OF THE CASE

This appeal is from the district court's granting of Appellees' Motion to Dismiss under Rule 12(b)(6), since the Complaint failed to state a claim upon which the requested relief could be granted. The proceedings in the lower court disclose solely an attack by the Appellants on the constitutionality of Act 109 on its face. They did not seek to void the statute on grounds of any statewide practice or policy of the nonpublic schools as a class; statewide, they claimed only that the "church-relatedness" of "most" of the nonpublic schools dooms the statute. Appellants, moreover, have limited their attack solely to the seven Appellee Schools. Even assuming that these seven schools —less than six-tenths percent of all nonpublic schools in Pennsylvania—are constitutionally disqualified by their practices from participating under Act 109, that fact could not invalidate the statute. Hence, affirmance of the district court's judgment that Act 109 is constitutional does not preclude any qualified party from alleging and proving facts which would make the application of the Act unconstitutional with respect to a particular school.

Having directed their attack exclusively on the statute in its universal operation, Appellants themselves ripened this case for disposition under Rule 12(b)(6). They cannot now plead for discovery of trial on issues which they made irrelevant.

A. The Proceedings Below

Appellants repeatedly alleged that the ". . . act on its face and as applied *by the defendant Superintendent of Public Instruction and the defendant State Treasurer . . .*" is unconstitutional. (Complaint, ¶¶ 12, 13, 14, 15, 18, 19 and 20. A12-15). They failed to allege, however, what particular actions were taken by the named state officials in violation of the statute. No charge is made that the Rules and Regulations, under the Act, are unconstitutional as promulgated, administered or applied. Indeed, Appellants' counsel admitted that the Complaint, notwithstanding its employment of the phrase, "as applied", did not allege official maladministration of the Act and insisted that the Complaint was aimed at the facial constitutionality of the statute:

> "And it is this *statutory machinery in its entirety* which is claimed to be *unconstitutional* in the present complaint. Obviously, we are not concerned here with the improper exercise of authority in a particular case where the action purports to rest on an otherwise constitutional foundation. In this case *the foundation itself, the underlying statute,* by which taxpayers funds are sought to be given to sectarian institutions is claimed to be invalid and the doom of that foundation on a state-wide basis is the obvious objective of the present case." Plaintiffs' Memorandum on the Necessity of a Three Judge Court (A60). (Emphasis supplied).

Thus, as to official action, the "application" claim relates solely to the terms of the statute. As to action by others, the "application" claim is pitched at the Appellee Schools. Nowhere in the Complaint do Appellants charge that the Act (assuming that it is constitutional on its face) can be voided by applying it to the statutory classification of "nonpublic" schools. It stands to reason that if the Act passes constitutional muster on its face and is not misapplied by the state officials so long as the beneficiaries of the Act are nonpublic schools and otherwise qualify under

the Act, receipt of funds pursuant thereto can in no sense be unconstitutional. Assuming, *arguendo*, that this ambivalence in the Complaint could have been resolved in favor of making out an application claim, the record below makes it abundantly clear that Appellants below foreclosed such a reading of the Complaint.

Appellants selected only seven of the 1,181 nonpublic schools then under contract pursuant to Act 109. They were joined as ". . . representative of all sectarian institutions in the Commonwealth of Pennsylvania and of all educational institutions (presumably both public and nonpublic) [which discriminate against persons on racial or religious grounds] the number of such sectarian and other educational institutions being too numerous to be conveniently joined as Defendants in this suit." (Complaint ¶ 7 (A11)).

A reading of the "Factual Allegations" and, indeed, of the entire Complaint, reveals only three statements of fact with respect to nonpublic schools:

(a) their policies and practices discriminate against students or teachers on racial or religious grounds (Complaint, ¶¶ 7, 14 and 15 (A11-A13))

(b) and in that respect, the named schools are representative of all such sectarian institutions in the Commonwealth and all educational institutions, and

(c) that the schools are church-related—that is, they are controlled by a church which promotes a particular religious faith through the operations in the school. (Complaint, ¶ 13, A12-A13).

Following service of the Complaint, Appellee Schools moved under Rule 23(c) for a hearing and determination that the action not be maintained as a class action. This motion afforded Appellants the opportunity for a full and complete evidentiary hearing to show: whether, in fact, the seven named schools had the policies or practices alleged in the Complaint; whether, and to the extent to which, they were church-related, and whether and to what

extent, they were "representative" of any one or more of the 1,181 schools (denominational, multi-denominational, or nondenominational) under the Act. In the proposed hearing, Appellants could have tried to clarify the meaning of their allegation, "most of the other educational institutions". (Complaint, ¶¶ 13, 14, 15 (A12, A13)).

A Rule 23(c) hearing would have been the only fair way, with respect to all nonpublic schools not then before the court, to determine whether any of those schools should fall within the alleged class whose rights Appellants sought to have determined and bound by the judgment of the court. Moreover, the hearing would have followed the teaching of *United States* v. *Raines*, 362 U.S. 17, 23 (1960), that the court not reconsider the constitutionality of an act in applications not before it.

Appellants did not want a factual hearing. Instead their Answer to the Rule 23(c) motion stated: "Plaintiff agrees (*sic*) that the action shall not be maintained as a class action under Rule 23(c) . . ." (A42). Accordingly, the court entered an order directing that the action should not be maintained as a class action. (A54). This made it crystal clear that Appellants' attack was solely on the face of the statute.

At this stage of the proceedings the lower court questioned the propriety of a statutory three-judge court and directed the parties to submit briefs on the necessity thereof.

In their memorandum on that question (A54) Appellants insisted upon a three-judge court as necessary to nullify the statute as a matter of law. In that connection, they declared that their Complaint must be read as follows:

> "The complaint, by direct allegation, attacks the basic constitutionality of a statute which provides for statewide aid to private schools. That statute is challenged both on its face and as applied as violative of the First and Fourteenth Amendments. *Thus, the entire statu-*

> *tory scheme is claimed to be unconstitutional* and is sought to be placed in jeopardy . . . *Certainly it would be a strained misreading of the complaint to in any way construe it as limited to a particular grant to a particular school or class of schools or to anything less than an attack on the entire statutory scheme.* (Emphasis supplied).
>
> . . . in this case the foundation itself, the underlying statute, by which taxpayer funds are sought to be given to sectarian institutions is claimed to be invalid and the 'doom' of that foundation on a statewide basis is the obvious objective of the present case."

On oral argument, Appellants' counsel persisted in this position:

> "*I am not saying,* and I think I have made this clear, *that this Act is only unconstitutional as to these defendant schools.* I am talking about it being unconstitutional in its entire *purpose,* thrust and *effect* . . ." (Excerpt from Oral Argument, A65). (Emphasis supplied).

Having thus limited their allegations of church relatedness and disqualifying practices solely to the seven Appellee Schools and having abandoned the allegations of representativeness of these schools, Appellants paved the way for summary disposition of their First Amendment claims.

B. The Propriety of Dismissal of the Complaint Under Rule 12(b)(6)

With the "Factual Allegations" of the Complaint in this posture, the district court then proceeded to determine whether Appellants set forth any claim upon which the requested relief of statutory nullification could be granted.

In Paragraph 18 of the Complaint (Section III, "Causes of Action"), Appellants aver, in the words of the *Allen* test, that the statute's purpose and effect advances religion. This is clearly a conclusion of law. That paragraph

further alleges that Act 109 finances the blending of sectarian and secular instruction by providing direct aid to "sectarian schools". These are equally conclusions of law.

In judging the sufficiency of the Complaint as a matter of law, the district court followed the classic formula:

> "A motion to dismiss is the usual and proper method of testing the legal sufficiency of the Complaint. For the purposes of a motion, the well-pleaded material allegations in the Complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted." 2A Moore's Federal Practice 10.08 (1968).

If Appellants' view of the office of this motion is correct, the Rule must be eliminated. They would insist upon full discovery and trial of the issues in all lawsuits.

The theory which Appellants did urge this Court to accept is that once a complaint characterizes a statute as "unconstitutional",[17] or for that matter, a document attached to the complaint as a "contract",[18] the Court is

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[17] See, *e.g.*, *Nortz* v. *U.S.*, 294 U.S. 317 (1935) (this Court dismissing a suit on demurrer and holding that plaintiff's allegations as to the legal effect of the legislation therein involved are not admitted for the purpose of the motion). See aso, *Pacific States Box and Basket Co.* v. *While*, 296 U.S. 176 (1935) (this Court holding in affirming a dismissal of the complaint on motion that the presumption of regularity in a constitutional case is overcome by pleading conclusions of law); *LeClair* v. *Swift*, 76 F. Supp. 729 (E.D. Wis. 1948) (stating that general conclusions of fact do not rebut the presumption of constitutionality of state action).

[18] See, *e.g.*, *Droppleman* v. *Horsley*, 372 F. 2d 249 (10th Cir. 1967) (holding that a motion under Rule 12(b)(6) does not admit the legal affect of a writing attached to a complaint); *Halliburton Co.* v. *Norton Drilling Co.*, 302 F. 2d 431 (1962) (dismissing a third party complaint in which the pleader characterized his dealings with the third party as a contract and holding that this characterization should be afforded no weight in determining the sufficiency of the Complaint); *Case* v. *State Farm Mutual*, 294 F. 2d 676 (5th Cir. 1961); *Ott* v. *Holme S. & L. Ass'n.*, 265 F. 2d 643 (9th Cir. 1958).

barred by that conclusion from preliminarily examining the legal consequences of the writing (either statute or document) and must proceed with discovery and a trial on the merits.

Mr. Justice Holmes disapproved of a pleader's attempt to foreclose the Court's appraisal of an allegedly unconstitutional statute by pleading his claim with conclusions of law. In *Pierce Oil Corp.* v. *City of Hope,* 248 U.S. 498 (1919), the plaintiff brought an action to enjoin as unconstitutional the operation of an ordinance which it said was unreasonable since it deprived it of property without due process. A demurrer was filed to the complaint which was sustained in the lower court. In holding that the complaint failed to state a claim, Mr. Justice Holmes refused to be bound by the pleader's characterizations of the ordinance, stating:

> "The averment that the ordinance is unnecessary and unreasonable, if it be regarded as a conclusion of law upon the point which this court must decide, is not admitted by the demurrer. If it be taken to allege that the facts exist that lead to that conclusion, it stands no better . . . Only facts well-pleaded are confessed." *Id.* at 500.

Freed from the strictures with which Appellants attempted to shackle it, the lower court examined the purpose and effect of Act 109 and concluded that it was constitutional on its face. Appellants' attempt to characterize this action of the court as deeming their Complaint to be "wholly frivolous" is beside the point. The point is that the Complaint is insufficient to state a claim upon which the requested relief can be granted. No resort to pithy phrases such as "wholly frivolous", can convert unsupported conclusions of law into sufficient pleading.

That summary dispositions of issues under the Religion Clauses is neither novel or improper, as Appellants suggest,

is manifest from this Court's recent landmark decisions in *Board of Education* v. *Allen, supra,* and *Walz* v. *Tax Commission, supra.*

C. The Non-necessity for Discovery and Trial

In their Summary of Argument Appellants dedicate their brief to two propositions:

> (a) that " . . . Act 109 is *per se* unconstitutional on its face" and
>
> ". . . (b), since, if not, its basic concept, under which tax money is given to church institutions as a subsidy to be used by those institutions as they choose, is a scheme without precedent in American constitutional history. It therefore requires all of the invaluable setting which only the fullest development, by discovery and evidence, can provide." (Appellants' Brief, 13).

What is to be gained by discovery and evidence with respect to proposition (b)? Certainly, there is nothing to discover about "tax money"; the funding provisions of the Act are clear. The fact of payment to "church institutions" is obvious from the face of the statute and involves no need for trial. That the legislation is a "scheme without precedent in American constitutional history" is meaningless in terms of the necessity of a trial.

The major portion of Appellants' brief plays variations on the theme above discussed. The brief is replete with expressions of Appellants' "offers to prove" and "willingness to undertake" to prove whole hosts of facts which are not properly before this Court on a Motion to Dismiss, and even if they were, are either totally irrelevant to the issues or facts which Appellants had ample opportunity to prove.

If Appellants numerous "offers to prove" are genuine and accepted by this Court, there will result a principle which requires a Rule 12(b)(6) motion to be denied so long as the opponent of the motion offers to prove facts of any kind. Moreover, many of Appellants' offers to prove, if factually sustainable, in no way affect the constitutionality of the statutory scheme; at most, if in fact the practices which Appellants imagine occur, they would be acts committed in violation of the Act. This is a distinction which has consistently eluded Appellants in their ardor for discovery: there is a vast difference between practices which are not permitted by the Act and practices authorized by the Act. The former are violations of the Act; the latter would make the Act unconstitutional on its face. Appellants attempt to divert attention to practices without making this distinction, while the focus must be directed to the Act. Other "offers to prove", since the action is no longer a class action, must be read as offers to prove specific instances of unconstitutionality which cannot invalidate the statute. In short, the making of a record for which Appellants so desperately plead, will not convey to this Court any additional relevant information about the Act.

III. ACT 109 IS NOT A LAW RESPECTING AN ESTABLISHMENT OF RELIGION

All parties hereto agree that, as the court below held, *Board of Education* v. *Allen*, 392 U.S. 236 (1968), provides the test to be applied with respect to whether Act 109 violates the Establishment Clause. (Appellants' Brief, 23). Subsuming to *Allen* all relevant prior decisions under the Religion Clauses, this Court there expressed the test to be whether the challenged legislation has (a) a secular legislative purpose, and (b) a primary effect that neither advances nor inhibits religion. 392 U.S. at 243. This pragmatic test rejects any absolutist concept of church-state separation and recognizes the complex and often "competing demands" of Establishment and Free Exercise

objectives. The test has been endorsed by the Court in its recent decision in *Walz* v. *Tax Commission of the City of New York*, — U.S. —, 25 L. Ed. 2d 697, 703 (1970).

A. Act 109 Meets the Allen Test of a "Secular Legislative Purpose"

1. The Purpose of the Act Is Found on Its Face

The purposes of the General Assembly in enacting Act 109 are plainly stated on its face. These purposes unequivocally describe a secular and public legislative purpose.

The significance of a legislature's declaration was underscored in *Allen, supra,* where the Court stated:

> "The express purpose of § 701 was stated by the New York Legislature to be furtherance of the educational opportunities available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose." 392 U.S. at 243.

Similarly, the court below found the purpose of the Act to be clearly expressed within its four corners (310 F. Supp. at 45 (A91)), and thus found it unnecessary to examine the legislative history.[19]

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[19] Appellants charge that the lower court, by such refusal, "misapplied the *McGowan-Schempp-Allen* test", since, "in the original formulation of the test, Chief Justice Warren in *McGowan* specifically calls for the purpose of the legislation 'to be examined in conjunction with its legislative history'. 366 U.S. at 453." (Appellants' Brief, 29). This is an incomplete and thus misleading quotation. The full statement of the Court in *McGowan* reveals the opposite and confirms the correctness of *Allen* as followed in the lower court's opinion herein:

> "We do not hold that Sunday legislation may not be a violation of the 'Establishment' Clause if it can be demonstrated that its purpose—evidenced *either on the face of the legislation,* in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion." 366 U.S. at 453. (Emphasis supplied).

The General Assembly, in the title of the Act, declared that Act 109 is an act "to promote the secular education of children of the Commonwealth of Pennsylvania attending nonpublic schools", that the purpose of the Act's Fund is "to finance the purchase of secular educational services from nonpublic schools", that reimbursement under the Act is in payment "for the rendering of secular educational service", and that the Act is "to promote the welfare of the people of the Commonwealth of Pennsylvania." Under Pennsylvania law, the title of an enactment, setting forth its purposes, is legally part of such enactment. *City Stores Co.* v. *Philadelphia*, 376 Pa. 482 (1954).

The title is followed by extensive legislative findings (Section 5602). These recite the observed facts upon which the General Assembly based its judgment: the crisis in elementary and secondary education in the Commonwealth, the extensive educational burden borne by nonpublic education in Pennsylvania, and the public purposes achieved by nonpublic schools.

Appellants have not claimed the Act to be in any respect *ambiguous* (thus necessitating resort to the legislative background for purposes of clarification). Rather, Appellants ask this Court to hold that the General Assembly was guilty of deception, or sham, in falsely expressing its actual purpose in enacting the legislation. This Court has already precluded excursions into legislators' motivations:

> "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. As the Court long ago stated: 'The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.' *McCray* v. *United States*, 195 U.S. 27, 56 . . . (1904)." *United States* v. *O'Brien*, 391 U.S. 367, 383 (1968).

See also, *Daniel* v. *Family Security Life Insurance Co.*, 336 U.S. 220, 224 (1949); Frankfurter, *Some Reflections on*

the Reading of Statutes, 47 Col. L. Rev. 527, 529 (1947). The court below properly rejected Appellants' attempt to involve it in a labyrinthine examination of the individual motivations of 250 legislators. See *U. S.* v. *O'Brien, supra* at 384-385.

Closely related to the foregoing is the presumption of constitutionality resting upon the principle of the separation of powers. The General Assembly of Pennsylvania and the Governor—familiar with the social needs of Pennsylvania—have enacted, and their work is presumed good, and their work does, in legal fact, represent the will of the people of that state. The burden of this litigation rests, not upon the Commonwealth, nor upon the contracting schools, but upon those who ask this Court to pronounce that the legislature and the governor of a state have acted in violation of the national constitution.

2. The Purpose of the Act Is Plainly Secular

As found in *Allen,* and declared in Act 109, the education of children undoubtedly serves a secular public purpose. The crucial public interest in education was confirmed in *Brown* v. *Board of Education,* 347 U.S. 483 (1954):

> "Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." 347 U.S. at 493.

The Supreme Court, in *Allen,* reaffirming its long held view that nonpublic schools, including religiously affiliated schools, serve public purposes (citing *Pierce* v. *Society of*

Sisters, 268 U.S. 510 (1925), and *Cochran* v. *Louisiana State Board of Education*, 281 U.S. 370 (1930)) stated:

> "Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience . . . Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. *This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education.*" 392 U.S. at 248. (Emphasis supplied).

Indeed, were the foregoing not true, no state could justify its qualifying of nonpublic schools as satisfying the requirements of compulsory education laws.

The four subject areas (Mathematics, Modern Foreign Languages, Physical Science and Physical Education) covered by the Act are plainly areas of vital importance in the educating of young people today. They are required by the Pennsylvania State Board of Education. Their priority has been recognized at the national level in the National Defense Education Act and by general consensus of educators.[20]

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[20] See, *Regulations of the State Board of Education of Pennsylvania*, Chapter 7, General Curriculum Regulations, March 14, 1969, Sections 7-211, 7-232, 7-233; National Defense Education Act, 20 U.S.C. 401 *et seq.* (1958). See also, CONANT, THE AMERICAN HIGH SCHOOL TODAY, 47, 69-71; RICKOVER, EDUCATION AND FREEDOM, 154; IMPERATIVES IN EDUCATION, Amer. Assn. of School Administrators, 167; DONOGHUE, FOREIGN LANGUAGES AND THE SCHOOLS: A BOOK OF READINGS, 6; The Society of State Directors of Health, Physical Education and Recreation, "The School Programs in Health, Physical Education and Recreation—A Statement of Basic Beliefs"; FEHR, *Mathematical Education for a Scientific, Technological, and Industrial Society*, in MATHEMATICS TEACHER, Nov., 1968, 665.

To claim that the Commonwealth of Pennsylvania could not honestly undertake to advance "the task of secular education" for such a large portion of its children in nonpublic schools by statutes such as Act 109 is to ignore reality, the face of the statute, and the declarations of the Commonwealth's executive officers.[21]

Appellants and their *amici* imply that the term, "purpose", as employed in the *Allen* test, means the purposes, or motivations, of those who have founded and maintained religiously affiliated schools. (Appellants' Brief, 22).[22] But it is the intent of the legislature to which

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[21] In signing Act 109 into law the Governor of Pennsylvania declared:

> "The modern challenges of education, rising costs and other economic problems are placing enormous burdens on our entire system of education—public and nonpublic; higher and elementary and secondary.
>
> "As a society we have a responsibility to help all in our education system meet these challenges within the principles of our constitutional government. We are doing that with this new law." News Information Release, Governor's Office, Commonwealth of Pennsylvania, June 19, 1968.

The chief educational officer of the Commonwealth similarly declared:

> "I regard this legislation as squarely in the public welfare interest because it plainly serves to advance the education of youngsters in this State. As you know, it provides State financial aid to education by the purchase, by the Commonwealth, of secular educational services from nonpublic—including religiously affiliated—schools." Dr. David H. Kurtzman, Superintendent of Education of the Commonwealth. See News Release, Department of Public Instruction, Commonwealth of Pennsylvania, November 8, 1968.

[22] See also, Brief *Amicus Curiae* of American Jewish Committee, American Jewish Congress, *et al.*, 10-14. This brief is almost a verbatim reprint of that which the same organizations filed in *Allen*. The chief arguments which it makes with respect to purposes of parochial schools were thus before the Court in that case.

the test refers and not the subjective motivations of citizens who support such schools.

The same misapplication of the purpose test was also raised, and rejected, in *Allen*. There the Court recognized that the New York act covered "religious", "sectarian", "parochial" schools (392 U.S. 236, 345). It nevertheless held that the New York act had a secular legislative purpose.

B. Act 109 Meets the Allen Requirement of Having No Primary Effect That Advances Religion

1. Act 109 Does Not Advance Religion—Primarily or Otherwise

To void a statute on its face, a court must find an "inevitable" or "necessary" unconstitutional effect which is dictated by the "scope and operation" of the statutory text. *United States* v. *O'Brien*, 391 U.S. 367, 385 (1968); *Board of Education* v. *Allen, supra*, at 243. This inevitable effect under the Establishment Clause must be "primary" and one that "advances" religion. The commonly accepted meaning of "primary" is *"first in importance", "chief", "principal"*,[23] while that of "advance" is *"promote", "increase", "move forward", "improve", "further"*.[24] It is plain that the necessary scope and operation of the test of Act 109 has no inevitable primary effect that advances religion.

The precedent cases decided by this Court which treat the issue of unconstitutional effects under the Establishment Clause fall into two groups. The first group involves state sponsorship of distinctly religious exercises or religion classes in public schools. *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203 (1948), *Engel* v. *Vitale*, 370 U.S.

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[23] American College Dictionary, 961 (1967); Webster's Third New International Dictionary, 1800 (1961).

[24] American College Dictionary, 18 (1967); Webster's Third New International Dictionary, 30 (1961).

421 (1962), *School District of Abington Twp.* v. *Schempp,* 374 U.S. 203 (1963). Similar results obtained in cases of state action implying or requiring support of traditional religious belief. *Torcaso* v. *Watkins,* 367 U.S. 488 (1961), *Epperson* v. *Arkansas,* 393 U.S. 97 (1968).

The second group of cases pertains directly to the issue of government aid to secular functions of church-related institutions, and are instructive and apposite to the issue of primary statutory effect in the case at bar. *Cochran* v. *Louisiana State Board of Education, supra, Everson* v. *Board of Education,* 330 U.S. 1 (1947), and *Board of Education* v. *Allen, supra. Cochran* held that a state program of furnishing, with public funds, secular textbooks for use in nonpublic (including religiously affiliated) schools served a public purpose, and had no unconstitutional effect in aid of such schools. The Supreme Court examined the "operation and effect of the legislation" (*Cochran, supra,* at 374). Pointing to the religious character of the schools and the sectarian function carried out therein, it nevertheless held that the statute in question had the effect of benefiting the public:

> "The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation because of them. The school children and the state alone are the beneficiaries. It is also true that the sectarian schools, which some of the children attend, instruct their pupils in religion, and books are used for that purpose, but one may search diligently the acts, though without result, in an effort to find anything to the effect that it is the purpose of the state to furnish religious books for the use of such children . . ." *Id.* at 375.

Everson involved a challenge, under the Due Process Clause, to a New Jersey statute which authorized bus transportation of parochial school children at public expense. The challenge was on two grounds: that the statute served a private purpose and also that it promoted an establish-

ment of religion. As to the first, *Everson*, like *Cochran*, upheld the statute as serving a public purpose, with the following observation:

> "It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose. *Cochran* v. *Louisiana State Bd. of Education*, 281 U.S. 370 . . ." *Everson, supra*, at 7.

The Court went on to rule that the effect of the statute was not to violate the Establishment Clause, even though it recognized that, under the bus program, "children are helped to get to church schools" and that

> "There is even the possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares . . . when transportation to a public school would have been paid for by the State." 330 U.S. at 17.

Allen squarely posed the question whether state aid directly to the educational processes afforded by parochial schools violates the Establishment Clause. Challenged in *Allen* was a New York statute requiring local public school authorities to lend secular textbooks free of charge to, *inter alia*, students attending religiously affiliated schools. The plaintiffs in *Allen* attacked the New York law as having a primary effect that advances religion because the statute "authorizes and permits the use of public moneys in aid and maintenance of religious schools." (Complaint, *Allen*, Appendix 6a). This program required state financing in the amount of $5,093,000. for the year 1967-68.[25]

As in *Cochran* and *Everson*, the Court found no primary or necessary effect advancing religion. In support of its finding that the New York act had a primary secular effect, the Court declared:

> "'[The State's] interest is education, broadly; its method, comprehensive. Individual interests are aided

[25] See *State Aid for Elementary and Secondary Education in New York*, 1966-67,44.

only as the common interest is safeguarded.'" (Quoting from *Cochran, supra,* at 375). *Allen, supra,* at 247.

Allen, like *Cochran* and *Everson,* stressed that it is the character of the function aided and not that of the institution in which the function is performed, which is determinative of primary effect. Upholding the statute as aid to a secular educational function, the Court stated that it

> "... has long recognized that religious schools pursue two goals, religious instruction and *secular* education. .... A premise of this holding [*Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925)] was the view that the State's interest in education would be served sufficiently by reliance on the *secular teaching* that accompanied religious training in the schools maintained by the Society of Sisters ... [I]f the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their *secular educational function.*" (Emphasis supplied). *Id.* at 244-247.

> "This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education." *Id.* at 248.

As in *Cochran* and *Everson,* the Court in *Allen* recognized that the secular benefits of the New York statute might "make it more likely that some children choose to attend a sectarian school", (*Id.* at 244) but deemed that consequence not to be constitutionally controlling.

Since the *Allen* case deals with the "primary effect" of the New York law, it is pertinent to compare that law with the Pennsylvania Act here in question. Such a comparison reveals that Pennsylvania's Act 109 even more clearly falls within the ambit of primary secular effect as expounded in *Allen.* Act 109 is confined to four patently non-value related subjects; the New York law contained no such restriction. Act 109 expressly prohibits the intro-

duction of religious content or instruction in the aided subjects; the New York law contained no such restriction.[26] Act 109 goes far beyond the New York law in assuring[27] the achievement of purely secular objectives through its requirements of standardized state testing and teacher qualification in the aided subjects.

Walz v. *Tax Commission, supra,* reinforces and amplifies this Court's *Cochran-Everson-Allen* teaching as applied to Act 109. It is not directly controlling here because it dealt with tax exemption of places of worship and not state aid to secular functions of church-related social agencies.

Nevertheless, *Walz* expressly confirmed the test and rationale of *Allen:*

> "Supplying of costly teaching materials was not seen either as manifesting a legislative purpose to aid or as having a primary effect of aid contravening the First Amendment. Board of Education v. Allen, 392 U.S. 236 (1968). In so doing the Court was heeding

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[26] The sole restriction was found in Opinion of Counsel No. 181 of the University of the State of New York, Section 6:

> "a. The textbooks be non-sectarian (this eliminates denominational editions and those carrying the 'imprimatur' or 'nihil obstat' of a religious authority), and
>
> "b. The textbook has been designated for use in any public elementary or secondary schools of the State or * * * approved by any school board."

[27] The arrangement traditionally employed by the Commonwealth of Pennsylvania to support the rendering of secular services by church-related institutions, namely, reimbursement for services rendered (shorthandedly referred to as "purchase of services") has been found widely useful. This arrangement however, is merely one of several possible techniques to safeguard the public interest. The purchase of service feature of Act 109 is not constitutionally critical or determinative of the issue of "primary effect". Clearly, Act 109 would be constitutional if it used other equally satisfactory arrangements, as was the case with the New York law upheld in *Allen.*

both its own prior holdings and our religious tradition." *Id.* at 703.

It cannot be denied that Act 109 has no primary effect that advances religion.

C. The Appellants' Contentions

All of the Appellants' contentions in this case rest squarely upon one foundation premise, and these contentions must stand or fall exclusively on that premise. The central thesis, of which all other points are but variations, is that all church-related schools must be deemed *solely* "religious enterprises" or *solely* "religious institutions" --as a fixed proposition of constitutional law—and that, therefore, no function of such schools may be publicly aided. Once the "religious enterprise" view of church-related schools is accepted, it makes no difference in what incident of church relationship it finds expression—whether, for example, in sponsorship by a church or religious group, or the religious motivations of supporters, or religious "atmosphere" in a school, or the providing of religious along with secular education.[28] As a universal proposition, the "religious enterprise" theory arises from the *sole fact* of church relationship, without reference to contingencies of how church-related schools may vary in their attitudes and practices in pursuit of their dual functions.

Once Appellants' generalization of an inseparably "religious enterprise" falls, all of their satellite arguments follow it. For if, as a matter of law, government may aid secular functions of church-related schools (and other social service institutions), it cannot be said to be preferring one religion over another, or using "essentially" religious means to further secular ends, or involving the state in entanglements with "religion". Nor can the confinement of aid to the secular function justify any claim of

[28] See Appellants' Summary of Argument (Appellants' Brief, 13, 14) and also Appellants' Brief, 4, 5, 9, 18, 20, 22, 23, 26 and 27).

"divisiveness" since equality before the law in the enjoyment of civil secular benefits cannot be attacked with justification.

The delusive simplicity of the "religious enterprise" theory has not found favor with this Court, or even with a predominance of the commentators.[29] The theory ill measures the complex foundations of our established educational pluralism, and presents no workable framework for our social needs. See MEIKLEJOHN, *Educational Cooperation Between Church and State*, 14 Law & Contemp. Prob. 61, at 71, 72 (Winter 1949). Its essential vice is that it would classify church-related schools as churches, and thereby practically place such schools and their students beyond the pale of public interest.

This Court has repeatedly refused to outlaw from public concern and benefits such students "because of their faith or lack of it". A necessary corollary has been the Court's refusal to accept overstated, blanket classifications of multiple-function institutions which serve the welfare of citizens. In looking to the function primarily served, this

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[29] *Compare* Giannella, *Religious Liberty, Non-Establishment and Doctrinal Development*, Part II, 81 HARV. L. REV. 513 (1960); Freund, *Pubic Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969) *with* Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 200, 313 (1968); Testimony of M. DeWolfe Howe before Congress, in Constitutionality of Federal Aid to Education in Its Various Aspects, Senate Document 29, 87th Cong., 1st Sess., 50 (1961); Hutchins, *The Future of the Wall*, THE WALL BETWEEN CHURCH AND STATE (Oaks ed.) 17, 22, 25 (1963); Kauper, RELIGION AND THE CONSTITUTION, 112, 113 (1964); Katz, RELIGION AND AMERICAN CONSTITUTIONS, 73-75 (1964); Kurland, *Politics and the Constitution: Federal Aid to Parochial Schools*, 1 LAND AND WATER LAW REVIEW, 475, 493, 494 (1966); Landynski, *Governmental Aid to Nonpublic Schools*, 36 SOCIAL RESEARCH, 333, 350, 353 (1969); Schwarz, *Religious Liberty, Non-Establishment and Doctrinal Development—a Reply to Professor Giannella*, 81 HARV. L. REV. 513 (1968); Valente, *Aid to Church Related Education—New Directions Without Dogma*, 55 VA. L. REV. 579, 599 (1969).

Court has refused to indulge any such absolutist constitutional outlawry that would smother voluntarism and the very religious liberty objectives that underly the First Amendment. Carrying forward its prior authorities, the latest Establishment Clause decision confirms the foregoing analysis:

> "The sweep of the absolute prohibitions in the Religion Clauses . . . was to state an objective, not to write a statute." *Walz* v. *Tax Commission, supra,* 25 L. Ed. 2d 701 (1970).

> "The course of constitutional neutrality . . . cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions . . ." *Id.* at 701-702.

Thus short of the clear extremes

> ". . . There is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.* 702.

In line with these observations, it is clear that the "religious enterprise" theory would be no more desirable if applied to church-related schools than it would be if applied to other church-related social service institutions. It would, in its practical effect, set government against religion and paralyze the power of both government and religion to serve their common constituents in the areas of their "concurrence of function." See Jacob W. Landynski, *Government Aid to Nonpublic Schools,* 36 Social Research No. 3, 333 at 344, 345 (Autumn 1969).

I. Does Church Relationship Disqualify a School From State Assistance to Its Secular Educational Function?

Appellants assert that Act 109 violates the Establishment Clause because it causes tax moneys to be paid "directly" into a "church institution's treasury" (Appellants' Brief, 27, also *passim*). Despite the applicable decisions of this

Court, Appellants continue to press their interpretation of the meaning of the *Everson* case as holding that "no-aid" may be afforded to education in church-related schools. That view is clearly discredited by *Board of Education* v. *Allen, supra,* at 243. Further, the contention that governmental action may not, however indirectly, lighten the economic burden of churches or their related institutions, was patently repudiated by this Court's decision in *Walz*. The Court there acknowledged the economic relief flowing to churches from tax exemption but did not deem such an aid to religion to be in violation of the Establishment Clause. The appellant in *Walz* also argued that economic relief from taxes to churches aided religion by "freeing up funds" for other church uses. In connection with this contention and specifically with respect to educational aid, this Court said:

> "Similarly, making textbooks available to pupils in parochial schools in common with public schools was surely an 'aid' to the sponsoring churches because it relieved those churches of an enormous aggregate cost for those books. Supplying of costly teaching materials was not seen either as manifesting a legislative purpose to aid or as having a primary effect of aid contravening the First Amendment. *Board of Education* v. *Allen*, 392 U.S. 236 . . . (1968)." —— U.S. ——, 25 L. Ed. 697, 703 (1970).

Thus the court below properly rejected the test of whether educational aid is channeled to the student or directly to the servicing school as the basis for determining the Establishment issue:

> "Such an approach would place form over substance . . . The child and society generally certainly benefit from the improvement of the secular education the child receives regardless of whether there is a direct payment or loan to him or to his parents or to his school or teachers . . . The use to which the funds are put must be the primary concern." 310 F. Supp. 47, 48 (A97).

The fallacy of Appellants' argument, that aid to any function, however secular, of a church-related institution must be deemed an unconstitutional aid to religion, is obvious when viewed against the precedents of myriad federal and state programs in support of secular services by direct payment to denominational orphanages, protectories for wayward or needful children, colleges, hospitals, and homes for the aged. Many of these "religious institutions" provide, and are reimbursed for, educational as well as general health care services. Were the fact of church relationship and of direct payment to such institutions constitutionally controlling, as Appellants insist, all such practices surely could not have survived to this day.

Appellants seek to caricature Act 109 as a "facade" "to confer . . . varying amounts of public funds on private and religious institutions for doing what they are already doing." (Appellants' Brief, 31, 32). Long before Act 109 was enacted, Pennsylvania had adopted a series of statutes which implemented the same statutory pattern employed in Act 109.

Going back as far as 1929, Pennsylvania has consistently employed purchase of service contract procedures to reimburse church-related institutions for all manner of child-welfare services, including education in church-related orphanages and protectories. See, *e.g.*, Act of April 19, 1929, P.L. 177, 71 Pa. Stat. Ann. § 611.9 (repealed 1967); Act 21 of 1967, §§ 201, 901, 62 Pa. Stat. Ann. §§ 206, 901; Pennsylvania Department of Welfare, Office of Family Services—Title 3100 Regulations—Voluntary Child Welfare Agencies. More recently, the state extended its established pattern of welfare distributions, in disbursement of federal and state medicare funds, by a statute and purchase of services contract administration that are remarkably similar to those employed under Act 109. See Act 21 of 1967, § 901, 62 Pa. Stat. Ann. § 443, as amended, Act 273 of 1967, § 5, 62 Pa. Stat. Ann. § 443.1 (supp.).

No one would seriously contend that the Commonwealth's power to make reimbursement for medical services depends upon the *form* (whether by contract or otherwise) through which such reimbursement is made. It is also useful to note that massive use is made of the contract reimbursement pattern for distribution of public interest funds under many federal, as well as state, laws. See, *e.g.*, the listing of federal education, training, research and other welfare laws in Supplement B, Part 1 of this brief.

Thus Appellants not only misconceive Pennsylvania tradition and law (see *e.g.*, *Schade* v. *Allegheny County Inst. Dist.*, 386 Pa. 507 (1956)) but they also mistakenly make formal methods the test of constitutionality.

The charge that Act 109 requires church-related schools to do nothing more than they were already required to do is both factually false and legally irrelevant. In the absence of necessary economic resources, a given church-related school today may not be able to continue educating children; hence state support of its secular educational function may well enable it to perform public services which otherwise it could not. Further, the fact of social commitment of a school or orphanage to provide education or care is irrelevant to the state's constitutional power to encourage and support such activities in the interest of its citizens. The only true test is whether a statute has a secular purpose and primary effect that does not advance religion.

Similar responses may be made to Appellants' allusions to the use of a "contract" procedure under Act 109.[30] As in all purchase of service arrangements, the

[30] It is assumed that Appellants do not seriously press the disposition of this appeal on contract principles. Pennsylvania law requires only that the promisor suffer a "trifling inconvenience", to support a binding promise (*Mikos* v. *Kida*, 314 Pa. 561, 172 A. 101 (1934); *York Metal & Alloys Co.* v. *Cyclops Steel Co.*, 280 Pa.

significance of the "contract" is not, as Appellants insist, to provide a constitutional justification for such support, but only to assure proper performance by the reimbursed agency, pursuant to state standards. The validity of the Act itself turns not upon the form of the arrangement, but upon the grounds laid down by the Supreme Court in *Cochran-Everson-Allen.*

In their zeal to condemn Act 109, Appellants lose sight of the true public interest features of the statutory scheme, namely, the avoidance of outright gift or subsidy to the institution providing the service. By requiring a measurable *quid-pro-quo,* the statute precludes any handout, and insures limitation of the institutional role to that of a service conduit, as distinguished from the true and ultimate beneficiaries of secular education.

2. Does Act 109 Authorize Blending Sectarian and Secular Instruction?

The Appellants complain that Act 109 "finances and participates in the blending of sectarian and secular instruction" (Complaint, ¶ 18 (A15)), contending that, in a parochial school, no demarcation between the religious and the secular is possible. (Appellants' Brief, 45). This they assert in spite of the express prohibitions in the Act which make non-reimbursable the cost of any instruc-

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385, 124 A. 752 (1924); *Stearns* v. *Targe,* 34 D. & C. 2d 399, 52 Del. Co. 96 (1964). The benefit to the Commonwealth and the detriment to the participating schools is: the Act's requiring the use of non-sectarian books, the testing requirements for their students and the promise to hire teachers possessing the qualifications required for certification by the Commonwealth. Moreover, Pennsylvania courts have repeatedly sustained contracts in which a party rendering services to another voluntarily can enforce an express promise made by the recipient of the services that they shall be paid for if the services are continued. See *e.g., Sutch's Estate,* 201 Pa. 305, 50 A. 943 (1901); *Currey's Estate,* 26 Pa. Super. 479 (1904); *Pohl's Estate,* 136 Pa. Super. 91, 7 A. 2d 14 (1939).

tion which would "include any subject matter expressing religious teaching, or the morals or forms of worship of any sect". (Section 5603(3)). Appellants' contention thus amounts to the charge that public administrators and parochial school teachers—whether lay or religious—cannot be trusted to observe the statutory limitation.[31]

These same contentions were before this Court in *Allen*. The plaintiffs there argued: "There is no such thing as secular education in a sectarian school. The whole curriculum is permeated by religion". (Brief for Appellants, New York Civil Liberties Union of counsel (*Allen*), 16). The Court in *Allen* rejected this "inevitable religious permeation" argument. Basing itself on America's "background of judgment and experience" with respect to private and parochial schools, and with express reference not merely to textbooks but to instruction, the Court refused to take judicial notice—and thus to impose an irrebuttable presumption of law—"that all teaching in a sectarian school is religious". 392 U.S. at 247-248. It recognized that parochial schools perform *secular* functions—which it expressly distinguished from their sectarian functions. *Id.* at 248. The Court flatly discountenanced the view that, although a statute limits benefits to secular functions, administrators and teachers will perforce violate

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[31] See, *e.g.*, the warning by one group of *amici curiae*, which implies not merely dishonesty on the part of those who administer the statute and those who teach in parochial schools but paints a crudely false caricature both of the modern education there afforded as well as the Act: "How can there be assurance that a teacher, teaching mathematics in a Catholic parochial school will not use . . . rosary beads for teaching counting? Similarly, how can the state be assured that the teacher of modern Hebrew in a Jewish day school in Pennsylvania does not include some reference to Jewish 'forms of worship' precluded by the Act?" Brief of *Amici Curiae*, American Jewish Committee, American Jewish Congress, *et al.*, 28.

the statute, or the legal obligation imposed by Paragraph 1 of the contract:[32]

> "Absent evidence, we cannot assume that school authorities, who constantly face the same problem in selecting textbooks for use in the public schools, are unable to distinguish between secular and religious books or that they will not honestly discharge their duties under the law." *Id.* at 245.

The court below correctly followed the teaching of *Allen* on these questions. 310 F. Supp. at 46-47 (A95).

It bears stressing that Appellants here attack the Act on its face. Should any violation of the Act occur through misapplication, the Commonwealth and the courts are not without power to deal with it. But no instance of misapplication is raised by this action.

Finally, Appellants' argument ignores the realities of contemporary education. Society, as well as parents of parochial school children, demand that that schooling be geared, without quality differentiation, to general educational standards. These contemporary demands relating to class time requirements and notoriously mounting pressures for academic excellence do not permit church-related schools to be eccentric schools of religiosity as they are caricatured by Appellants and their supporting *amici*. The influence of standardized testing is pervasive.

Appellants attempt to make much of the "atmosphere" of church-related schools, citing their physical proximity to churches, their architecture and religious furnishings. These obvious facts were assumed by this Court in *Allen*, where the Court acknowledged that students in church-related schools receive instruction in religion in addition to instruction in secular courses. See, CHOPER, *The Estab-*

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[32] The contract form is contained in *Rules and Regulations for Implementing the Pennsylvania Nonpublic Elementary and Secondary Education Act*, 11.

lishment Clause and Aid to Parochial Schools, 56 Calif. L. Rev. 260, 297, 298 (1968).

3. Does Act 109 Prefer One Religion Over Another?

Appellants attack the Act as preferring "one religion over another or, at most, two or three religions over all others." (Appellants' Brief, 36). The Complaint, however, in no way alleges preference of one religion over another. Nor do Appellants point to any language of the Act which would create such a preference. The Act contains no such language. Rather, it applies equally to all nonpublic schools, religious or otherwise:

> "'Nonpublic school' shall mean any school, other than a public school, within the Commonwealth of Pennsylvania, wherein a resident of the Commonwealth may legally fulfill the compulsory school attendance requirements of law." 24 Pa. Stat. Ann. § 5603(4).

Appellants' attack arises solely from the fact that most of the participating nonpublic schools are religiously affiliated, and that most of these are Catholic. This is admitted but irrelevant. The test of nonpreference of religion is to be found in the fairness and neutrality of the classification of a statute's coverage. See *Walz* v. *Tax Commission*, *supra*, 25 L. Ed. 2d 697, 703, 717, 718 (1970). Thus in *Walz*, the fact that the economic relief from tax exemptions incidentally redounded to greater savings to those religions which owned churches of far greater value than the majority of sects did not, in law, amount to an unconstitutional preference of any one religion. Similarly in *Allen*, where the Court could well assume that the Catholic parochial schools and students would, by reason of their predominant numbers, receive the major portion of the statutory benefit. Finally, in *Sherbert* v. *Verner*, 374 U.S. 398, 409 (1963), this Court flatly rejected the contention that the exemption of Sabbatarians from unemployment compensation laws would be a preference for

their religion by the state, so as to constitute an establishment of religion. Absent any invidious discrimination among religions by the statutory terms, the claim of preference of religion is clearly without foundation in the law.

The court below, quoting *Everson*, properly stated:

> "'The fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason * * * to say that a legislature has erroneously appraised the public need.'" 310 F. Supp. at 45.

Act 109 does not select any group as its favored object; *citizens*—most but not all of them Catholic—have selected parochial schools in which to educate their children. This choice has always been available to all Pennsylvanians willing to make the sacrifices necessary to build and operate independent schools meeting state requirements. This choice was not made by supporters of parochial schools in derogation of their legal duty to pay taxes for the total support of those schools which the majority—in like exercise of their conscience—desired for their children.

4. Does Act 109 Use Essentially Religious Means To Serve Secular Ends?

Appellants argue that Act 109 uses "religious means to serve secular ends", citing the *Torcaso* and *McGowan* cases, without indicating how those decisions substantiate their claim. (Appellants' Brief, 39). Their apparent reliance upon a quotation from the concurring opinion of Mr. Justice Brennan in the *Schempp* case that "government may not employ religious means to serve secular interests . . ." (*Ibid.*) is not justified by the full text and context of Mr. Justice Brennan's opinion. In that opinion, Mr. Justice Brennan very meticulously and repeatedly modified the phrase "religious means" by use of the word *"essentially"* (*Id.* at 294, 295), thus making clear that it is government's employment of religion as

such, and not of the secular functions of church-related institutions, which is prohibited by the Establishment Clause. If any doubt concerning this reading of *Schempp* ever existed it was set to rest by this Court's decision in *Allen* to that effect and Mr. Justice Brennan's joinder in the opinion of the Court in *Allen*. Finally, Mr. Justice Brennan, himself, clearly laid to rest the Appellants' unwarranted interpretation of his opinion in *Schempp* by his elaboration thereof in *Walz*. In specific explication of the term, "use essentially religious means to serve governmental ends", he pointedly stated:

> "The means churches use to carry on their public service activities are not 'essentially religious' in nature. They are the same means used by any purely secular organization—money, human time and skills, physical facilities." *Walz, supra,* at 715.

> "First, these organizations are exempted because they, among a range of other private, nonprofit organizations *contribute to the well-being of the community in a variety of nonreligious ways, and thereby bear burdens that would otherwise either have to be met by general taxation, or be left undone to the detriment of the community.*" *Walz, supra,* at 712. (Emphasis supplied).

Indeed the majority opinions in *Walz* make clear that the Appellants' overblown version of the "religious means" aspect of the purpose and effect test is untenable. Thus, as a matter of law as well as common sense, only an absurd construction of the term, "essentially religious means", can make it applicable to the secularly rendered instruction in Mathematics, Modern Foreign Languages, Physical Science, and Physical Education supported under Act 109.

5. Does Act 109 Create an Excessive Interdependence Between the State and Churches?

Appellants broadly argue that this Court has held the Establishment Clause to forbid interdependence between religious institutions and the state, without making clear what they mean by "interdependence". At one point, they refer to any "working arrangement between [church and state]" (Appellants' Brief, 40); at another point they say that the degree of interdependence must be so great as to have "threatened the freedom of each" (*Ibid.*); at another, they invoke Mr. Justice Rutledge's belief that the furnishing of bus transportation to parochial school children involved unconstitutional interdependence (*Id.* at 41), although this Court rejected that conclusion.

It is clear that this Court's references to "interdependence" (and "involvement" and "entanglement") are not intended to include all administrative relationships between religious institutions and the state. *Walz, supra,* 25 L. Ed. 2d at 703. The Court has stressed that not mere "involvement" but "excessive" involvement is constitutionally prohibited; not mere "entanglement" but "impermissible" entanglement. *Walz, supra,* at 705. Constitutionally, "interdependence" is significant only in terms of whether its primary effect is to advance or inhibit religion. Appellants argue that Act 109 creates an unlawful interdependence because (a) it promotes "divisiveness" and "controversy" (b) it produces "entanglements" which threaten or invade the religious liberty of institutions.

(a) The "divisiveness and controversy" argument.

This Court has not isolated religion or education as objects concerning which public discussion ought not to be had:

> "Adherents of particular faiths and individual churches frequently take strong positions on public

> issues including . . . vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right." *Walz, supra,* at 702.

It is obvious that the Establishment Clause is not to be read as a suppressant of religious difference. The plain implication of Appellants' novel "divisiveness and controversy" doctrine amounts, however, to just that. The inescapable meaning is that a statute aiding the secular education of children in parochial schools is void because it may occasion future public disputes by persons who oppose such aid.[32a]

Since disputes can also arise over the tax exemption, not only of places of worship (*Walz* was itself one such dispute), but also over tax exemption or church-related hospitals, colleges, schools, homes for the aged, or the properties of Ethical Culture societies, the tax exemption of these, too, would necessarily amount to that sort of "involvement" which (under Appellants' reasoning) it is the business of the Establishment Clause to prevent. So also with the draft exemption, or the clerical exemption in the Social Security Act.

Under this branch of Appellants' test, in order to find out whether a statute violates the Establishment Clause, a court should apparently first make up its mind as to whether anybody will oppose the enactment or operation of the statute and, if it guesses that there will be opposition, then it must further guess how much. This is an open invitation to those who oppose, let us say, state purchase of useful secular educational services for parochial school children, to *make controversy,* indeed to make

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[32a] To the same effect is the recent decision in *DiCenso* v. *Robinson,* — F. Supp. — (D.C., R.I., 1970), reflecting a total misreading of this Court's opinion in *Walz.* This may be compared with *Tilton* v. *Finch,* — F. Supp. — (D.C., Conn., 1970) which upheld, over Establishment Clause objection, federal grants to sectarian colleges under a statute embracing detailed and long term relationships with government. See 20 U.S.C. §§ 701, 754.

a *religious* issue of the matter, now realizing that the more virulent is their campaign, the more fully is the "divisiveness and controversy" test met. Thus, the appearance of peaceableness in this test vanishes and its true face is seen, as a test which incites embroilment.

Under this test, considerations of *law* also vanish. The New York educational program for children, upheld by the Supreme Court, would likely have been terminated and its benefits to young citizens lost had the Appellants' test been applied. In New York, "controversy" arose as the result of the efforts of citizens to obtain this secular benefit for their children,[33] and a subjective judgment could have been rendered by the courts that the controversy was substantial. Thus, upon the basis of judges' guesswork that opponents of the program had in fact raised a violent enough hue and cry, the children in question would have been deprived of a substantial educational benefit to which, since *Allen,* we find they were constitutionally entitled. While the *Allen* test places religious majorities in states at no advantage, the Appellants' test places religious minorities everywhere at a *constitutional* disadvantage wherever their opponents decide to light the fires of conflict.

In our own time, a wide variety of federal and state programs conducted by many different religious denominations in the fields of health, welfare and education are, by Appellants' peculiar doctrine, inherently unconstitutional. But the reality is that these programs, however initially marked by controversy, were soon met with broad enthusiastic acceptance by the American people.

(b) The "entanglements" argument.

The Appellants also say that Act 109 unconstitutionally entangles religious bodies—and, in particular, parochial schools—in the tentacles of the state. The decisions of this Court do not lend them support.

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[33] See article, "Assembly Votes Textbook Loans", New York Times, May 12, 1965.

The entanglement which the Court has indicated would be unconstitutional, as having a primary effect of inhibiting religion, must be of that degree which would "*tip the balance toward government control of churches or governmental restraint on religious practice.*" *Walz, supra,* at 702. (Emphasis supplied). In making the net judgment whether that degree is present in a given relationship between government and religion, the quantitative and qualitative details of that relationship are relevant but not *per se* controlling. As the Court has made clear, the ultimate test is whether religion is being unconstitutionally compromised.

American public policy has long deemed salutary those cooperative relationships between government and voluntary organizations whereby needed public goals are achieved. In these relationships, by which government sponsors research, affords stimulation to private enterprise, or in other ways utilizes the capacity of private resources, rarely is it ventured that regulation, limited to reasonable protection of the public interest, in effect obliterates, Communizes, or oppresses the essential vitality of the private sector. Among these cooperative relationships are today a host of funded federal and state programs affecting education and welfare as administered by church-related institutions. (See Supplement B.). These programs involve necessary continuity of relationship, as well as, in many instances, state licensing of institutions and their professional staff, performance testing, supervision, accreditation, evaluation, inspection, audit, and other techniques to insure that the public gets what it pays for in terms of secular quality. These successful programs enjoy widespread approbation and are not condemned as oppressive of religion.

The constitutionality of one such program, involving the area of education, was upheld by this Court in *Allen.* There the Court pointed out:

> "Since Pierce, a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy com-

pulsory attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction.

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". . . if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular function." 392 U.S. at 246.

The Court also stated that: "New York State regulates private schools extensively", and that "A great many state cases have upheld a wide range of private school regulation." (*Id.* at 246). Such regulation applies, of course, to New York's religiously affiliated schools. Indeed the statute itself, considered in *Allen,* provided for a substantial degree of state regulation. (See full text of Opinion of Counsel No. 181, The University of the State of New York, Education Department (1966)).

In light of the foregoing, and particularly when compared with the "entanglement" found in the existing compulsory school attendance laws of all states, Act 109 cannot seriously be considered as creating a novel or unconstitutional relationship between the state and church-related schools. Nonpublic (including parochial) schools are already extensively regulated in Pennsylvania. (See Supplement C). This body of regulation, like that provided for in Act 109 itself, has been found unobjectionable by the private school administrators who, over the years, have experienced it. The Act, as noted, pertains solely to Mathematics, Modern Foreign Languages, Physical Science, and Physical Education, and not to the whole curriculum nor to the general administration of the schools. There is no involvement with the religious function.

Furthermore, the Act does not require any nonpublic school to participate under it. Any nonpublic school

is free to not participate. The fact that so large a number have elected to participate must be respected as a judgment that the Act does not result in oppression of religion. At the beginning of its third year of administration of the Act, the Commonwealth of Pennsylvania has found the program to be functioning well. (See Supplement D).

Finally, the limited "involvement" found in Act 109 must be viewed in terms of voluntarism. While voluntary agencies in education and welfare will not be able to continue to render their unique contributions to our society in the absence of a measure of public help, it is equally true that they may not expect such help without reasonable regulation limited to the specific secular function aided. Inherent in the democratic concept of enabling these agencies to pursue their "concurrence of function" is the necessity of some "interdependence", so long as it is not excessive. To characterize this fair balance of interests as "politics in religion" or "religion in politics" is to obfuscate the complexity of constitutional law. See *Walz, supra,* Harlan, J. concurring at 719.

Appellants also say that Act 109 provides "subsidy" to churches and indicate that the payments feature of the Act results in unconstitutional interdependency. Under the teaching of *Allen,* it is clear that the form of the governmental support (property, money or credit) to secular functions of church-related institutions is not constitutionally controlling. It would obviously make no sense to say that Pennsylvania would violate the Establishment Clause if it were to make a cash payment of $700 to buy cane chairs from a Methodist Home for the Blind, but that it would not violate the Establishment Clause by a free, long term loan to a sectarian college of $700,000 worth of laboratory equipment. More important, however, is the fact that Act 109 involves no subsidy: the schools use *their own money* to pay for the secular educational services rendered; only after they have rendered these services

and paid the actual cost thereof themselves does the Commonwealth (for its own declared public purposes) *replace* that money. The earnings represented by this replacement money, in exchange for services rendered, become the property of the sellers of the service, and the right of disposal thereof is no more questionable, constitutionally, than their right initially to commit funds to the support of these educational services. *Hysong* v. *Gallitzin Borough School District,* 164 Pa. 629, 656 (1894).

IV. ACT 109 IS NOT A LAW PROHIBITING THE FREE EXERCISE OF RELIGION

It is difficult to determine whether Appellants now press a claim under the Free Exercise Clause. They do not raise it in their "Questions Presented", or in their Summary of Argument, and they do not argue the issue in their brief. See Rule 40(1)(d)(2), Rules of the Supreme Court. To state a cause of action under the Free Exercise Clause, a party must allege that the law coerces him, as an individual, in the practice of his religion. Appellants, as the court below pointed out, made no allegation in their Complaint "as to what their particular religious beliefs are nor how the Education Act, by authorizing the purchase of secular educational services, coerces them in the practice of their religion." 310 F. Supp. at 48 (A99). This Court has held such an allegation indispensable to a Free Exercise cause of action. In *Allen,* in holding that the statute there considered did not violate the Free Exercise Clause, the Court stated:

> "Appellants also contend that § 701 offends the Free Exercise Clause of the First Amendment. However, 'it is necessary in a free exercise case for one to show the coercive effect of the enactment as it *operates against him in the practice of his religion'*, Abington School District v. Schempp, 374 U.S. 203, 223 . . . and appellants have not contended that the New York law in any way *coerces them as individuals in the practice of their religion.*" *Id.* at 248. (Emphasis supplied).

To like effect, see *School District of Abington Township* v. *Schempp, supra,* at 223.

The Complaint fails to allege any facts sufficient to show that, so far as the Appellants are concerned, the Act "coerces them as individuals in the practice of their religion". No facts are alleged in the Complaint stating the religious beliefs of any of the Appellants. The bald conclusion that the Act violates Appellants' consciences is not supported by any fact allegation concerning their religion, their particular religious practices, their particular religious observances, the dissemination of their particular religious views.[34]

It is manifest that the Act does not, by any feature of its language, place any restriction on the exercise of anyone's religion. It merely enables Pennsylvania to aid the secular education of children in all nonpublic schools of the state. Appellants, however, seek to derive from the face of the Act the legal conclusion that it compels the individual taxpayer to support religion. The reasoning

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[34] Research discloses no decision under the Free Exercise Clause in which the bare allegation of compulsory taxation for the support of religion has been held by the Supreme Court to state a cause of action under the Free Exercise Clause. To the contrary, the Free Exercise cases, without exception, deal with individual religious belief or with the manifestations of such belief in action. *See, e.g., Reynolds* v. *United States,* 98 U.S. 145 (1878) (practice of polygamy as requirement of personal religious belief); *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940); *Niemotko* v. *Maryland,* 340 U.S. 268 (1951); *Kunz* v. *New York,* 340 U.S. 290 (1951); *Fowler* v. *Rhode Island,* 345 U.S. 67 (1952) (preaching and proselyting); *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943) (solicitation of sales of religious tracts); *Follett* v. *McCormick,* 321 U.S. 573 (1944) (evangelism); *United States* v. *Ballard,* 322 U.S. 78 (1944) (use of mails to propagate individual's religious views); *Braunfeld* v. *Brown,* 366 U.S. 599 (1961) (observance of Sabbath); *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943); *Torcaso* v. *Watkins,* 367 U.S. 488 (1961) (compulsion to declare a belief).

set forth under discussion of Point III, *supra*, of this brief compels the conclusion that *Board of Education* v. *Allen* is controlling authority concerning the issue of Free Exercise in the instant case and that the Complaint does not state a cause of action respecting Free Exercise. As has been shown, the Act achieves a secular legislative purpose and has no primary effect which either advances or inhibits religion. That being so, the court below properly concluded that the Act does not invade the religious liberty of any individual.

V. NO ORGANIZATIONAL APPELLANT HAS STANDING TO BRING THIS ACTION; NO INDIVIDUAL APPELLANT HAS STANDING UNDER THE FREE EXERCISE OR EQUAL PROTECTION CLAUSES

Six organizations and three individuals (Appellants here) initiated this action. The district court ruled (without dissent): that none of the six organizational Appellants had standing to sue; that no individual Appellant had standing to sue under the Equal Protection Clause; that, of the individual Appellants, only the Appellant Lemon had standing under the Establishment[35] Clause; and (one judge dissenting) that all three individual Appellants had Free Exercise standing. Appellants attack the rulings of the court below, contending that all Appellants have standing to sue under all of the asserted causes of action.

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[35] Appellees agree with the court below, that the individual Appellants Worrell and Reardon do not have standing under the Establishment Clause. Since it is clear that the individual Appellant Lemon does have Estabishment Clause standing, Appellees elect not to present argument herein upon the lack of Establishment standing of Worrell and Reardon.

A. The Organizational Appellants Have No Standing To Bring This Action

Six organizations claim standing to sue in this case. The asserted bases for standing are:

(a) that each is "an association of persons resident in the Commonwealth of Pennsylvania"

(b) that all "carry on activities in the Eastern District of Pennsylvania"

(c) that all "share as a common objective the separation of church and state and the opposition to the use of public funds for the support in whole or in part of sectarian schools, or other private schools whose policies and practices, by purpose or effect, exclude or otherwise discriminate against persons by reason of race or religion"

(d) (as to Pennsylvania State Conference of NAACP), that its purpose is to seek the elimination of racial discrimination through resort to judicial proceedings "and otherwise". (Complaint, ¶ 4. A9-10).

Conspicuously, the Complaint does not allege that these organizations are taxpayers; the organizations do not sue in that capacity. The Complaint says that the organizations "carry on activities in the Eastern District of Pennsylvania", but these are not described. It speaks of the organizations' members ("persons"), but it does not say that these are taxpayers, or that they are in any way injured, or even that they are citizens, but only that "some" are "resident in the Commonwealth of Pennsylvania". Further, the Complaint does not say that the challenged Act deals in any manner with the status or operation of any of the six organizations. It fails to allege, even generally, that the income, activities, membership, or any other organizational interest of any of the organizations is injured, or threatened with injury, by virtue of the challenged statute.

Finally, the Complaint does not provide specific reference to formal purposes of the associations as undoubtedly stated in their respective charters, constitutions or by-laws, but rather is content with the general allegation that the organizations share certain "common objectives" which amount, at most, to shared ideas not actually shown to be relevant to the particular purposes or integrity of the respective organizational Appellants. These objectives pertain, in effect, to the separation of church and state and opposition to racial discrimination—sentiments not peculiar to them but shared by many individual members of the general citizenry and, indeed, by Appellees.

Flast v. *Cohen*, 392 U.S. 83 (1968), sets forth the principles which now govern standing to sue in the federal courts.[36] Measured against the law of that case, the assertions of the organizational Appellants do not spell out standing. *Flast* states that the initial point of focus, in an inquiry into standing, is the party—not the issues about which the party is talking:

> "The fundamental aspect of standing is that it focuses on the party seeking to get his Complaint before a federal court and not on the issues he wishes to have adjudicated." *Id.* at 99.

There are, the Court indicated, two basic questions relating, in turn, to such party: (1) whether he has

> ". . . 'a personal stake in the outcome of the controversy,' Baker v. Carr, supra . . ." *Id.* at 101.

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[36] All Appellants herein ground their actions exclusively upon the direct operation of the federal constitution. They do not rely upon standing created by special statute. Nor is their citation to the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*, relevant to the question. It is well established that the Act provides no independent ground for standing to sue, nor any expansion of federal jurisdiction beyond Article III limitations. The constitutional standing here sought by Appellants is governed exclusively by the principles laid down by the Supreme Court as to proper parties to invoke the Constitution to nullify legislation.

(2) ". . . whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Id.* at 102.

To have standing, a party must show both the "personal stake" and the "logical nexus".

The customary "personal stake" in constitutional litigation is that asserted by a taxpayer who claims that he suffers injury due to a given public expenditure. His "stake" is the loss of his tax money. The Appellant organizations do not assert this kind of stake. Neither, however, do they assert any other kind of interest which the federal courts have recognized as a "personal stake". *Cf., Baker* v. *Carr,* 369 U.S. 186 (1962) (injury to individual voting franchise), *Griswold* v. *Connecticut,* 381 U.S. 479 (1965) (injury from imposition of statute's criminal penalty).

> "*[T]he federal courts have consistently adhered to one major proposition, without exception: One who has no interest of his own at stake always lacks standing.*" Davis, *Standing: Taxpayers and Others,* 35 U. of Chi. L. Rev. 601, 617 (1968). (Emphasis by author).

As has been seen, Appellant organizations fail to assert any interest of their "own". The supposed "interest" is not a "stake" but an outlook, and is not "personal" to the organizations but widely shared.

Neither does there appear any logical nexus between the status asserted by these organizations and the claims sought to be adjudicated. Their status (not that of taxpayer) they describe as that of groups carrying on activities and sharing certain ideas and goals. It is such "status" that they seek to connect to the three claims they assert relating to the Equal Protection, Free Exercise, and Establishment Clauses. But if in fact the Act violates these clauses, or any one of them, the Appellant organizations fail to show any logical nexus between their

status *as organizations* and violations of these clauses. They do not show that the Act results in denial to them of equal protection, whether through invidious classification or other discrimination. Nor do they show that it violates the free exercise of religion by these associations. They fail to describe any practice, exercise or other expression of religious belief upon which the Act impinges. Appellants likewise fail to connect their status as organizations-with-objectives to any effect of the Act in establishing religion.

While Appellants do not brief the question which they raise respecting standing of the organizations, it is apparent that their claim of standing must rest either on the "private attorney general" theory [37] or else upon a misapplication of the doctrine of *jus tertii*. The former theory has not found acceptance by this Court. As to the latter, the organizational Appellants do not sue upon the basis of injury which members thereof claim they sustain or are threatened with, as individuals, by reason of the Act. There is no allegation that the members of any organizational Appellant are unable or disabled to assert their personal grievances independently of such association. The Court has repeatedly upheld the general principle that a litigant will not be permitted to achieve *plaintiff* standing by asserting the rights of third parties. *Tileston* v. *Ullman*, 318 U.S. 44 (1942); *Doremus* v. *Board of Education*, 342 U.S. 429 (1952); see particularly *Flast* v. *Cohen, supra*, p. 99, n. 20. The only departures from this rule, which are not truly exceptions, are cases which apply to the standing

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[37] The theory is actually not one of standing to sue but, in effect, of suing to stand. Applicable to the organizational Appellants is the comment of one court: "'*Apparently the sole purpose and the only function of plaintiffs is that they shall assume the role of actors so that there may be a suit which will invoke a court ruling upon the constitutionality of the statute.*'" *Doremus* v. *Board of Education*, 342 U.S. 429, 431 (1952) (quoting, on appeal, the Supreme Court of New Jersey in the same case). (Emphasis supplied).

of *defendant* parties to raise defenses based upon third party rights. Those cases do not create initial jurisdiction at the instance of a corporate plaintiff. Even in the latter cases, standing to raise *jus tertii* by way of defense is permitted only as a rule of necessity and in certain "unique" situations. See, *e.g.*, *NAACP* v. *Alabama*, 357 U.S. 449 (1958); *Gibson* v. *Florida Legis. Investigation Comm.*, 372 U.S. 539 (1963); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Barrows* v. *Jackson*, 346 U.S. 249 (1953); *Pierce* v. *Soc. of Sisters*, 268 U.S. 510 (1925). The cited *NAACP* case, and *Barrows* and *Griswold*, noted the consistency in rationale between the general rule of *Tileston*, and the special rules in the specified exceptional situations. In the case at bar there are no exceptional circumstances to convert the *jus tertii* defense rule to a rule of plaintiff standing.

In conclusion, it is clear that the lower court was correct in ruling that no organizational Appellant has standing to sue in this action.

B. No Individual Appellant Has Standing Under the Free Exercise or Equal Protection Clauses

The district court held (one judge dissenting) that all three individual Appellants have standing to sue under the Free Exercise Clause, and (unanimously) that no Appellant has standing under the Equal Protection Clause. Appellants assert that all individual Appellants have standing under both clauses.

1. Free Exercise

While Appellees deem the issue of Free Exercise standing to be not central to this appeal, they must deny that the Complaint gives basis for any such claim of standing. Of the three individual Appellants, only the Appellant Lemon can (by virtue of his having contributed to the fund administered under the Act) claim an economic injury.

But this Court has held that a bare economic interest is insufficient to confer Free Exercise standing. In *McGowan v. Maryland*, 366 U.S. 420 (1961), the employees of a department store, convicted of violation of Maryland Sunday laws, asked the Court to rule that those laws violated, *inter alia*, the Free Exercise Clause. The Court, holding that they lacked Free Exercise standing, stated:

> "But appellants allege only economic injury to themselves; they do not allege any infringement of their own religious freedoms due to Sunday closing. In fact, the record is silent as to what appellants' *religious beliefs* are." *Id.* at 429. (Emphasis supplied).

The individual Appellants, in the case at bar, do not allege any injury in fact to the practice of their particular religion. They do not state what, if any, manifestation, expression, exercise or practice of the religion of one, some, or all of them is operated against by the Act. In fine, since they have chosen to assert nothing respecting their religion, it is impossible to derive from the Complaint any basis whatever for their claim of standing to sue on Free Exercise grounds.

2. Equal Protection

The court below unanimously held that none of the Appellants have standing to sue under the Equal Protection Clause. On this Appeal, Appellants, under "Questions Presented", raise the issue of Equal Protection standing of all three individual Appellants but present argument in their Brief only with respect to the Appellant Lemon. (Appellants' Brief, 4, 48).

The allegations made in the Complaint, with respect to the Appellant Lemon, whose child attends a public school, do not satisfy the essential element that the Appellants allege that Lemon, or his child, thus personally suffered an Equal Protection injury by reason of de facto segregation

in the Appellee Schools (or in any school). There is no allegation that Lemon or his child sought or was denied admission to one of the Appellee Schools (or any other school), or even that they are denied such an opportunity by reason of de facto residential and school location patterns or practices. Absent any injury to his rights, Lemon has no standing to invoke the Equal Protection claim:

> "The Supreme Court has declared that the equal protection clause confers individual rights rather than group rights to equality. As a constitutional principle this generally means that equality of treatment must be measured as between individuals." See, Note—DEVELOPMENTS—EQUAL PROTECTION, 82 Harv. L. Rev. 1065 at 1111-1112 (1969) and cases therein cited.

The fact that the Appellant Lemon is a Negro does not, without more, entitle him to bring suit as a private attorney general on behalf of hypothetical third party Negroes who might, conceivably, be exposed to invidious discrimination in violation of the Equal Protection Clause. There is no more magic in color than in taxpayer status in conferring standing to sue. Race indeed is relevant to Equal Protection issues, but a Negro must still have a personal stake in the outcome of the controversy in order to satisfy the standing requirements of the federal constitution.

Should Lemon take the frontier position that Negro parents of public school children may complain of de facto racial segregation in private schools, because such de facto segregation aggravates racial imbalance in public schools to the injury of Negro public school children (and assuming, as we must for the purposes of this argument, that such a position is tenable as a matter of substantive law) he would still, under his Complaint, fail to establish standing to sue under the Equal Protection Clause. For one thing, the Complaint does not show that Lemon's child is in a racially imbalanced school, or is in any way threatened by racial imbalance in his public school. The Complaint

does not even reveal the school or grade level of Lemon's child. This bears directly upon any theoretical injury to which he might be exposed. Further the Complaint does not show how, or to what extent, any theoretical injury to Lemon's child would be cured by the denial to the State of the purchase of secular educational service from nonpublic schools for the benefit of nonpublic school children. Even under liberal federal notice pleading, Appellees are entitled to notice in the Complaint of the actual facts upon which the individual Appellants base their standing to sue. Lemon's resort to the extreme prayer for relief by cutting off educational aid which will benefit many innocent nonpublic school children, can hardly help his child. His action seems more punitive than remedial. Lemon may not complain of "possibilities" and future threats. See *e.g., United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947). As the Supreme Court very recently observed:

> "A proper party is demanded so that federal courts will not be asked to decide 'ill-defined controversies over constitutional issues', (citing *United Public Workers* v. *Mitchell* at 90)." *Flast* v. *Cohen, supra,* at 100.

From all of the foregoing, it is clear that the lower court was correct in its unanimous holding that no individual Appellant has standing to sue under the Equal Protection Clause.

CONCLUSION

It Is Respectfully Submitted That This Court Should Affirm the Judgment Below.

Dated August 10, 1970

Respectfully submitted,

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SUPPLEMENT

SUPPLEMENT

SUPPLEMENT A

Impact of Nonpublic Schools Upon Education in the Nation

PART 1

Message From The President of the United States on Education Reform to the Congress of the United States March 3, 1970*

* * *

(*f*) *Non-Public Schools.*—The non-public elementary and secondary schools in the United States have long been an integral part of the nation's educational establishment—supplementing in an important way the main task of our public school system. The nonpublic schools provide a diversity which our educational system would otherwise lack. They also give a spur of competition to the public schools—through which educational innovations come, both systems benefit, and progress results.

Should any single school system—public or private—ever acquire a complete monopoly over the education of our children, the absence of competition would neither be good for that school system nor good for the country. The non-public schools also give parents the opportunity to send their children to a school of their own choice, and of their own religious denomination. They offer a wider range of possibilities for education experimentation and special opportunities for minorities, especially Spanish-speaking Americans and black Americans.

Up to now, we have failed to consider the consequences of declining enrollments in *private* elementary and secondary schools, most of them church supported, which educate 11% of all pupils—close to six million school children. In the past two years, close to a thousand non-public elementary and secondary schools closed and most of their displaced students enrolled in local public schools.

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* 91st Congress, 2d Session, House of Representatives, Document No. 91-267.

If most or all private schools were to close or turn public, the added burden on public funds by the end of the 1970s would exceed $4 billion per year in operations, with an estimated $5 billion more needed for facilities.

There is another equally important consideration: these schools—non-sectarian, Catholic, Protestant, Jewish and other—often add a dimension of spiritual value giving children a moral code by which to live. This government cannot be indifferent to the potential collapse of such schools.

The specific problem of parochial schools is to be a particular assignment of the Commission.

In its deliberations, I urge the commission to keep two considerations in mind. First, our purpose here is not to aid religion in particular but to promote diversity in education; second, that non-public schools in America are closing at the rate of one a day.

* * * (p. 9)

Part 2

Pennsylvania's Nonpublic Schools—Financial Impact, Public Contribution

(This study was prepared by the Pennsylvania Catholic Conference, 212 State Street, Harrisburg, Pennsylvania and issued June, 1967.)

Financial Significance of Nonpublic Education In Pennsylvania

To meet the commitment to give all children in this State a sound education, Pennsylvanians are presently spending $1,546,000,000 on elementary and secondary education. According to the Pennsylvania Department of Public Instruction:

- $561 million of this sum is contributed annually by the Commonwealth.

- $635 million is contributed by taxpayers at the local school district level.
- $350 million represents the value of the contribution of those who send their children to nonpublic elementary and secondary schools.

Analysis of these figures brings out certain additional facts:

- $350 million represents 23 percent of the total cost of elementary and secondary education in the Commonwealth.
- $350 million is more than half (62%) of the contribution made by the Commonwealth.
- $350 million is more than half (55%) of the contribution made by the local school districts.

• • •

$350 million is a sum of critical magnitude in the public economy of our local communities and our State. Here is what this sum means in terms of actual expenditures of the Commonwealth of Pennsylvania for 1966-67:

- $350 million would have paid the budgeted cost of operation of 29 of the 33 departments, offices, boards and commissions of the State government;
- OR the combined budgeted cost of:
  Department of Commerce ($41 million)
  Department of Health ($43 million)
  Department of Community Affairs ($11 million)
  Department of Justice ($21 million)
  Department of Labor and Industry ($73 million)
  Department of Agriculture ($5 million)
  Department of Forests and Waters ($16 million)
  Pennsylvania State Police ($4 million)
  Department of State ($14 million)
  Treasury Department ($21 million)

Department of Revenue ($13 million)
Department of Property and Supplies ($54 million)
Department of Mines ($5 million)
Legislature ($9 million)
Judiciary ($8 million)
Public Utility Commission ($3 million)
Department of Military Affairs ($5 million)
Insurance Department ($2 million)

- OR just about the entire budget of the Department of Public Welfare ($356 million);

• • •

These facts are recited in order to emphasize the size and financial significance of the savings effected to the public by virtue of the existence of Pennsylvania's nonpublic schools. The consequences to the public economy by disappearance of this savings, or any substantial fraction thereof, would be most serious.

Local Tax Impact of Nonpublic School Cutbacks

Each public school district determines its own "per pupil cost"—that is, the amount which it feels it is able to afford for the education of children attending its schools. Thus per pupil cost will be found to vary from school district to school district. For example, in Abington School District the per pupil cost is $665; in Greater Latrobe it is $718; in Philadelphia it is $559; in Mount Lebanon, $626; in Westmont Hilltop, $676.

The cost is covered in part by the local school district and in part through reimbursement by the State. The percentage of reimbursement paid by the State to each school district (ranging from 10% to 86%, but presently limited by a ceiling of $400 per pupil) is worked out according to a statutory formula based chiefly on the value of real estate in the particular school district. . . . Under the formula nonpublic school pupils are not counted.

It is not difficult to see from the foregoing that the tax burden resulting from a shift of the nonpublic school population into the public schools of Pennsylvania would be unmanageable in many public school districts. The following table indicates the possible impact of this burden:

School District	Present Budget	Add'l Tax Burden*
Philadelphia	$190,356,179	$85,568,000
Erie City	13,897,410	5,351,164
Abington	10,987,648	3,737,040
Reading	9,251,672	3,060,514
Scranton	10,090,255	3,882,520
• • •		
St. Marys Area	2,201,440	1,259,382
Hanover Area	1,417,398	1,179,468
Olyphant	306,847	536,038
Altoona Area	9,349,832	3,035,565
Penn Cambria	1,647,059	952,740
• • •		
Greater Latrobe	3,618,083	1,421,640
• • •		
Pittsburgh	49,613,950	22,313,000
Mount Lebanon	6,213,637	1,400,938
Homestead-Munhall Area	1,441,617	914,733
Pottsville Area	1,614,679	684,981
Governor Mifflin	2,839,825	451,250
Wilkes-Barre	4,396,259	2,056,250
• • •		
Chester	9,000,000	2,081,784
• • •		

* Obtained by multiplying district's per pupil cost by the number of nonpublic school pupils resident in that district.

The difficulties would be particularly acute in major urban areas since the large nonpublic school populations located there would, when added to public school population, further dilute the valuation base upon which State

reimbursement is determined. Thus, for these areas the percentage of reimbursement would be more. Accordingly, both local tax money and required State funds would have to be substantially increased.

State Tax Impact of Nonpublic School Cutbacks

Substantial cutbacks in nonpublic school enrollments would increase not only local tax burdens. They would also add materially to overall State tax burdens. Limited to the area of education, the total State reimbursement would have to be increased in direct proportion to the influx into the public schools of nonpublic school children. The annual operating cost alone to the Commonwealth of an added public school population of the 600,000 pupils now in nonpublic schools would be in excess of $200 million on the basis of the present reimbursement formula.

Another Cost—Capital Expenditures

To speak of annual per pupil cost is not telling the whole financial story. Those who support nonpublic schools have invested vast sums in capital expenditures and until recent years, when the financial pinch has become more acute, have carried an annual multi-million dollar program to renovate or replace outdated facilities and to add new facilities. It is difficult to put a price tag on these facilities, but some idea of their value is given when their replacement cost is considered.

Current estimates indicate that it is possible to build a school for something between $1,800 and $2,000 per student. To this, of course, would have to be added approximately ten to fifteen percent for equipment, furnishings and other related costs. Let it be assumed that the cost of providing for each additional child would be in the neighborhood of $2,000. If the public schools of the Commonwealth were to take on the 600,000 plus students now attending nonpublic schools, the additional cost—in terms of capital ex-

penditure alone—would run in the neighborhood of $1.2 billion. Philadelphia, for example, would be confronted with a building program in the neighborhood of $313 million, while Pittsburgh would be confronted with a $75.5 million undertaking. Again, any substantial fraction of such added costs would prove financially intolerable.

In many urban areas land shortages are severe. Buildings or building sites for new public schools would have to be obtained chiefly through the acquisition of properties which are presently tax-producing. Thus, while, on the one hand, added costs of new construction would have to be assumed, real estate tax revenues would be decreased.

A Cost Not Measurable in Money: Administrative Dislocation

One of the heaviest costs which would result from the sizable transfers of nonpublic school populations would be administrative disorder, the long-term ill effects of which would be visited upon public school administrators, teachers, parents and, most of all, the children. . . .

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Phase Out—Phase In

Rather blithe reference is sometimes made to what is called a "phasing out" of nonpublic education, the assumption being that the very large and remarkably successful nonpublic school systems to which millions of citizens are deeply attached could be dismantled and their pupil population eased into our public schools. Two highly pragmatic difficulties reveal the total impracticality of the theoretical "phase-out": (1) a clearly predictable lack of public school capacity for a "phase-in"; (2) the impossibility of effecting any such movement on a programed basis. A majority of public school boards and administrators today are intensely preoccupied with the question of how they will contrive, in the next few years, simply to meet the

demands to be made upon the public schools on account of normal expectable growth, even without allowance for the manifold improvements being urged upon them by concerned citizens everywhere. . . . It is clear that if this crisis exists, speculation about "phasing-in" substantially new populations from the nonpublic schools is dangerously fanciful. In this connection, it must be pointed out that it is in precisely those areas of Pennsylvania (e.g., Philadelphia and Pittsburgh) where the crisis of the public schools is most acute, that the nonpublic school populations are largest.

The "phasing-out" of the nonpublic schools, if it is to come, would of necessity be dictated not by plan but by the geographically varying intensities of economic pressure, the personal decisions of parents in response to that pressure and the necessarily unprogramed closings of individual nonpublic schools when the long sustained effort to keep them would have collapsed.

The Financial Crisis Facing All Education In Pennsylvania

The Single Source of Educational Funds: the Taxpayer

. . . Faced with new tax burdens, some appear to find comfort in the fact that the State picks up a percentage of such burdens, while the local school districts pay only the balance.

This distinction unfortunately conveys the notion that there are, in fact, two different sources of taxation: one on which the State draws, and one which the local community has available. No such distinction is justified. The cold fact is that only one ultimate source of tax income exists: the individual taxpayer. Both the local and the State governments ultimately depend on this single source. The citizen pays for the cost of education.

Rising Costs for Government, for Living, for Education

Since 1950 the cost of operating state governments has increased about 300%. There is no indication that this trend will be reversed. To the contrary, there is every indication that it will become accentuated in the future. This, however, will be in the face of the fact that traditional sources of tax revenue are rapidly reaching their maximum possible yield, while new sources of tax revenue are more and more difficult to find. . . . State governments are in, or are approaching, financial crisis, and, as the present discussions in our General Assembly all too painfully reveal, Pennsylvania is no exception.

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. . . At the turn of the century the average per pupil cost was approximately $30. Today a number of systems are investing more than $800 per child.

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Rising Costs: Nonpublic Schools in Crisis

Rising cost, however, is not a phenomenon limited to the public schools. . . .

Nonpublic schools are confronted with the same difficulty. Construction and instructional costs have hit hard, and nonpublic school budgets are soaring to all-time records. The search for funds is just as much a preoccupation for the nonpublic school administrator as it is for his public school counterpart. And he agrees with the public school administrator, that simply meeting current needs is not enough, if excellence in education is to be achieved.

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Those who support nonpublic schools are finding it more and more difficult to provide the money even though they are willing to give it. *The demands made on them by an inflated economy and rising taxation for public schools are exhausting their ability to continue the job even though these demands have not exhausted their desire to do so.*

It is the exceptional family that does not live on a budget, and the average family can afford only so much for education. *As a greater share of that money for education is drained off by taxes for public education, little is left to invest in that educational program which does not share in tax funds.*

Ultimately, government at every level reaches into the same pocketbook to meet its needs, and that is the pocketbook of the individual taxpayer. That same pocketbook is the only source of funds available for the support of the nonpublic school.

We are obliged to point out to all of the public:

The curtailment or drastic reduction of the systems of nonpublic schools now serving almost a fourth of the elementary and secondary school children in the Commonwealth is now a distinct possibility.

At the same time all must recognize that such an occurrence would not be isolated in its effects to nonpublic schools alone. On the contrary, *the enforced termination of any substantial portion of nonpublic education in Pennsylvania would have extremely adverse effects upon public education in this State; on a large scale, the effects would be disastrous.*

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The Civil Contribution of Nonpublic Schools

Putting aside for a moment the serious fiscal consequences which the disappearance of nonpublic schools would have on public education, are there any other reasons which might impel us to conclude that they should continue in service?

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One obvious question is whether Pennsylvania's nonpublic schools are doing a good educational job.

The recent study on the merits of Catholic education financed by the Carnegie Foundation, as well as the Gree-

ley-Rossi report prepared at the University of Chicago, reveals the countless problems faced by the majority of nonpublic schools throughout the nation. At the same time, both studies authoritatively confirm what many previous surveys had indicated: *the children attending nonpublic schools are achieving, in the required and usual subjects, at a level beyond that expected of all children by experts in the field of education.*

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The United States Chamber of Commerce Task Force Report on American Education, issued this year, underscores this conclusion. The Report states:

> "We recommend that the government consider continuing to finance education for all children—but that it offer them, as an alternative to public education, financial support for private education up to the amount of the average expenditure per pupil in local public schools. We are led to this somewhat unusual conclusion by our belief in the importance of sound education and our concern that the present institutional structure in education may not be the best way to organize it."

The Report backed the concept of diversity in schools:

> "We take this diversity for granted in scholarship, in politics, and in the abundance and variety of the commercial marketplace. Why settle for the single choice in education? . . . We think it desirable that parents have a choice of schools for their children. . . . Different schools, none of them perfect, will have different combinations of strengths and weaknesses. Parents . . . should be able to choose to find the combination that best satisfies them and their children."

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Part 3

Geographical Data on Nonpublic Schools in the United States

Source: Professor Robert J. Havighurst (Professor of Education, University of Chicago), Symposium Paper, "Social Function of Catholic Education", published in "Catholic Education Today and Tomorrow" (National Catholic Educational Association, 1968), pp. 9-11.

Catholics had always been predominantly urban, and they now became metropolitan. Table 2 shows the percentages of all elementary school pupils who were enrolled in nonpublic schools in the 30 largest metropolitan areas in 1960. Whereas 15 per cent of all elementary school pupils in the U.S.A. were enrolled in nonpublic schools, 25 per cent of pupils in the 10 largest SMSAs were in nonpublic schools, and 19 per cent were so enrolled in the next 20 SMSAs. Only two of the top 10 areas, Los Angeles and San Francisco, had less than 15 per cent in nonpublic schools. The Table shows that the largest proportion of nonpublic school pupils are in the Northeast and the North Central states, with the smallest proportions in the South and on the West Coast. At least 75 per cent of nonpublic schools and 90 per cent of nonpublic school enrollment are Catholic.

TABLE 2

PERCENTAGES OF ELEMENTARY SCHOOL PUPILS ENROLLED IN NONPUBLIC SCHOOLS IN 30 PRINCIPAL SMSAs IN 1960

SMSA	Percent	Population (000)
New York-Newark-Jersey City	28	14,759
Chicago-Gary	32	6,794
Los Angeles-Long Beach	13	6,039
Philadelphia	34	4,343
Detroit	21	3,762
San Francisco-Oakland	13	2,649
Boston	23	2,595
Pittsburgh	29	2,405
St. Louis	29	2,105
Washington	18	2,002
Top Ten	25	47,400

SMSA	Percent	Population
Cleveland	29	1,904
Baltimore	20	1,727
Minneapolis-St. Paul	27	1,482
Buffalo	30	1,307
Cincinnati	33	1,268
Houston	9	1,203
Milwaukee	37	1,233
Kansas City	16	1,093
Dallas	7	1,083
San Diego	9	1,033
Seattle	11	1,017
Atlanta	5	1,017
Miami	11	935
Denver	13	929
Indianapolis	16	917
New Orleans	33	907
Portland, Ore.	12	822
Providence	30	821
San Bernardino, California	9	810
Tampa-St. Petersburg	7	772
Next Twenty	*19*	*22,300*
Total, USA	*15*	*180,000*

Table 3 is taken from an article by Erickson and Greeley, and shows the metropolitan areas with more than 30 per cent of elementary school pupils enrolled in nonpublic schools. Four of the first 15 are in the state of Wisconsin, where parochial schools have been especially strong, due

partly to the German influence. Of the first 20 SMSAs, six are in New England, and all the rest are in the Northeast and Middle West except for New Orleans.

TABLE 3

PERCENTAGES OF ELEMENTARY SCHOOL PUPILS ENROLLED IN NONPUBLIC SCHOOLS IN STANDARD METROPOLITAN STATISTICAL AREAS, 1960
(Higest 20 SMSAs)

SMSA	Percent	SMSA	Percent
Dubuque, Iowa	69	New Orleans	33
Green Bay, Wisconsin	55	Chicago-Gary	32
Lewiston, Maine	51	Rochester, New York	32
Manchester, N.H.	49	Kenosha, Wisconsin	31
Fitchburg, Massachusetts	41	Racine, Wisconsin	31
Bay City, Michigan	40	Ft. Wayne, Indiana	31
Jersey City, New Jersey	39	Fall River, Massachusetts	31
Milwaukee, Wisconsin	37	Lawrence, Massachusetts	30
Philadelphia	34	Buffalo, New York	30
Cincinnati	33	Providence, Rhode Island	30

Source: U.S. Bureau of the Census, 1960 Vol 1. U.S. Summary, Part 1.

Thus the developments in Catholic school systems which produce their particular contemporary quantitative characteristics are best seen in the large metropolitan areas of the Northeast and the Middle West. These developments have been studied for the Chicago Archdiocese (Cook and Lake Counties) by James Sanders, who has provided the first systematic data concerning the growth, distribution, and movement of Catholic schools in a large metropolitan area.

SUPPLEMENT B

Laws and Programs Involving Administrative Relationships Between Government and Denominational Educational Institutions

PART 1

FEDERAL LAWS AND PROGRAMS

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

Adult Basic Education. (P.L. 89-253; 78 Stat. 520; 42 U.S.C. 2801-2822). Authorizes O.E.O. to contract with or make grants to private colleges for training of teachers of illiterates.

Advanced Training of Nursing Teachers and Supervisors. (Public Health Service Act. Sec. 307; P.L. 86-105;73 Stat. 239; 42 U.S.C. 242(E)). Provides for the award of traineeships by grants to educational institutions for the training of nurses for supervisory or teaching positions.

Cancer and Chronic Disease Control Grants. (P.L. 88-136; 62 Stat. 469; 42 U.S.C. 282, 283). Provides grants to institutions of higher education for training programs in cancer control, prevention, and eradication.

Child Welfare Research, Training and Demonstration Projects. (Social Security Amendments of 1960; P.L. 86-778; 74 Stat. 997; 42 U.S.C. 726 (1964) as amended). Provides grants to nonprofit institutions of higher learning for special projects in the field of child welfare.

Chronic Diseases and Health Problems of the Aged. (Public Health Service Act, Sec. 301; P.L. 78-410; 58 Stat. 691; 42 U.S.C. 241 (1964), as amended). Grants to nonprofit health agencies and universities for research in the field of health problems of the aged are authorized.

Clean Air Control. (P.L. 88-206; 77 Stat. 392; 42 U.S.C. 1857). Authorizes grants to private educational institutions for research and surveys in air pollution.

College Library Resources. (Part A, Title II, Higher Education Act of 1965; P.L. 89-329; 79 Stat. 1224; 20 U.S.C. 1021-1028). Provides grants for acquisition of library resources to any accredited institution of higher education.

Cooperative Research Program. (Elementary and Secondary Education Act of 1965, Title IV; P.L. 89-10; 79 Stat. 44; 20 U.S.C. 331-332B (1965)). Authorizes grants and contracts to public and private universities and colleges for research, surveys and demonstrations in the field of education.

Crippled Children's Services. (Maternal and Child Health and Mental Retardation Planning Amendments of 1963, Secs. 3 and 4; P.L. 88-156; 77 Stat. 273; 42 U.S.C. 711-715 (Supp. V)). Provides for special grants to public and private institutions of higher learning for projects that contribute to the advancement of services for crippled children.

Education Advisory Services and Data. (Enabling Law of the Office of Education, 1867; U.S.C., Title 20–Education). Provides advisory services and publications to any school, college or university to aid in improving educational practices, methods of financing, construction of facilities, etc.

Education of Children of Low Income Families. (Elementary and Secondary Act of 1965; P.L. 89-10; as amended by P.L. 89-313). Provides grants to States for distribution to local agencies for expanding and improving educational programs for public and non-public school children.

Educational Opportunity Grants. (Part B, Title IV, Higher Education Act of 1965; P.L. 89-329; 79 Stat.

1232; 20 U.S.C. 1061-1069). Grants to deserving students to attend the institution of higher education of his choice are authorized.

Environmental Engineering and Food Protection. (Public Health Service Act, Sec. 301, as amended; P.L. 87-838; 76 Stat. 1073; 42 U.S.C. 241 (1964), as amended). Provides grants to colleges and universities for support of specified research projects.

Equal Education Opportunities Programs. (P.L. 88-352; 78 Stat. 246). Federal grants may be made to private institutions of higher education to operate programs dealing with desegregation in education.

Equipment to Improve Undergraduate Instruction. (Part A, Title VI, Higher Education Act of 1965; P.L. 89-329; 79 Stat. 1261; 20 U.S.C. 1121). Authorizes grants to pay part of the cost of laboratory, classroom or library equipment for the teaching of secular subjects to all institutions of higher education.

Faculty Development Programs. (Part B, Title VI, Higher Education Act of 1965; P.L. 89-329; 79 Stat. 1266; 20 U.S.C. 1131). Provides grants or contracts to all institutions of higher education for the operation of workshops, institutes, and programs for teachers in higher education.

Fellowships for Teachers. (Part C, Title V, Higher Education Act of 1965; P.L. 89-329; 79 Stat. 1258; 20 U.S.C. 1111). Provides for fellowships for graduate study leading to a masters degree to teachers or recent graduates wishing to enter the profession.

Grants for College Work—Study Program. (Economic Opportunity Act of 1964, Title I; P.L. 88-452, 78 Stat. 513; 42 U.S.C. 2751-2756 (1964). Part C, Title IV, Higher Education Act of 1965). Provides grants to public or private nonprofit institutions of higher edu-

cation to help them to assist students stay in school by providing part-time employment.

Guidance, Counseling, and Testing. (National Defense Education Act, Title II A and B; P.L. 88-210; P.L. 88-665; 72 Stat. 1592; 20 U.S.C. 481-484). Grants may be provided to the States or directly to private schools for the guidance, counseling and testing of elementary and secondary school children.

Health Professions Educational Assistance. (Title VII, Public Health Service Act, as amended; P.L. 89-290; 79 Stat. 1056-1058; 42 U.S.C. 292-295(e)). Provides funds for the construction or renovation of medical teaching facilities as well as student loans and scholarships for students of health professions.

Health Research Facilities. (Public Health Service Act; P.L. 89-115; 79 Stat. 448; 42 U.S.C. 292). Authorizes grants to institutions of higher education for construction of medical research facilities.

Health Research Project Grants. (Public Health Service Act; P.L. 87-838; 76 Stat. 1073; 42 U.S.C. 241D). Provides grants to defray costs of research in physical and mental illness and in water and air pollution to institutions of higher education.

Higher Education Facilities Construction Grants. (Title VII, Sec. 701A, Higher Education Act of 1965, amending Sec. 106 Higher Education Facilities Act of 1963; P.L. 89-329; 79 Stat. 1267; 20 U.S.C. 701-733). Provides grants to institutions of higher education for construction of graduate and undergraduate academic facilities for research and instruction in the sciences, languages, and for libraries.

Higher Education Facilities Construction Loans. (Title III, Higher Education Facilities Act of 1963; P.L. 88-204, 77 Stat. 372; 20 U.S.C. 741). Provides loans for

up to 75 percent of the cost of construction of academic facilities in institutions of higher education.

Hospital Construction and Renovation. (Public Health Service Act; P.L. 88-581; 78 Stat. 919; 42 U.S.C. 291). Provides grants to colleges or universities for construction or renovation of hospital facilities.

Institutes for Teachers of Disadvantaged Youth. (National Defense Education Act, as amended; P.L. 88-665. Title IX; P.L. 85-864; 78 Stat. 1107; 20 U.S.C. 15AAA-15GGG). Provides funds to institutions of higher education to operate institutes of advanced study for teachers of disadvantaged youth.

Juvenile Delinquency and Youth Development. (P.L. 88-368; 78 Stat. 309; 42 U.S.C. 2542-2544). Authorizes grants to institutions for projects, training and research in the prevention and control of juvenile delinquency.

Language and Area Centers. (National Defense Education Act; P.L. 88-665; 78 Stat. 1106; 20 U.S.C. 511a). Authorizes contracts with institutions of higher education to establish foreign language teaching centers.

Language Fellowships. (National Defense Education Act; P.L. 88-665; 78 Stat. 1106; 20 U.S.C. 511B). Provides payments to students to meet costs of training in selected modern foreign languages.

Language Research. (National Defense Education Act; P.L. 85-864; 72 Stat. 1594; 20 U.S.C. 512). Authorizes contracts with institutions of higher education for studies and surveys in instruction in foreign languages.

Language Institute Programs. (National Defense Education Act; P.L. 87-344; 75 Stat. 760; 20 U.S.C. 491, 521). Authorizes contracting with institutions of higher education for programs to improve qualifications of foreign language teachers. A similar provi-

sion covers institutions for academic counselors in elementary and secondary schools.

Library Training and Research. (Part B, Title II, Higher Education Act of 1965; P.L. 89-329; 79 Stat. 1227, 1228; 20 U.S.C. 1031-1034). Provides grants to institutes of higher education for the teaching of library science.

Loans to Nonprofit Private Schools. (National Defense Education Act; P.L. 85-864; 78 Stat. 1104; 20 U.S.C. 445). Provides for grants to State educational supervisory services for the acquisition of science, mathematics and foreign language equipment. A percentage of these funds must be alloted for loans to private, nonprofit elementary and secondary schools for the acquisition of such equipment.

Loans to Students in Institutions of Higher Education. (National Defense Student Loan Program). (National Defense Education Act, Title II, amendments 1964: P.L. 88-665; 78 Stat. 1100-1102; 20 U.S.C. 421-429 (1964)). Provides loan funds to eligible college or university to make low interest loans to needy students.

Low Interest Loans to Students in Institutions of Higher Education. (Part B, Title IV, Higher Education Act of 1965; P.L. 89-329; 79 Stat. 1236; 20 U.S.C. 1071). Provides loan insurance to students enrolled in a public or non-profit private institution of higher education on a half-time or full-time schedule.

Maternal and Child Health Services. (Maternal and Child Health and Mental Retardation Amendments of 1963: P.L. 88-156; 77 Stat. 273; 42 U.S.C. 701). Authorizes special project grants to extend and improve maternal and child health services to nonprofit institutions of higher education.

Medical Library Assistance. (Title III, Public Health Service Act, as amended; P.L. 89-291; 79 Stat. 1067; 42 U.S.C. 280A-280B). Provides grants for the construction, expansion or renovation of medical library facilities to public and private institutions of higher education.

Medical Research Grants. (Public Health Service Act; P.L. 87-838; 76 Stat. 1073; 42 U.S.C. 241). Authorizes research grants to public and private institutions of higher education.

Mental Health-Research and Training. (Public Health Service Act; 70 Stat. 929, 930; 42 U.S.C. 242(A)(B)). Colleges and universities are eligible for grants for research and training in the field of mental health.

Mental Retardation—University Affiliated Clinical Facilities. (Mental Retardation Facilities Construction Act of 1963; P.L. 88-164; Titles I, IV; 77 Stat. 282; 42 U.S.C. 291K). Provides project grants to college and university hospitals for the construction of mental health clinical facilities.

National Defense Fellowships. (National Defense Education Act; P.L. 88-665; 78 Stat. 1105; 20 U.S.C. 464). Provides funds to institutions of higher education for the award of graduate fellowships.

Nursing School Construction. (Nurse Training Act of 1964; P.L. 88-581; 78 Stat. 908; 42 U.S.C. 296). Construction grants for nursing school facilities are authorized.

Nurse Training. (Title VIII, Public Health Service Act as amended; P.L. 88-581; 78 Stat. 908-918; 42 U.S.C. 296, 297). Provides grants to public and private nonprofit schools of nursing for student loans, nursing training programs, and construction of training facilities.

Preparation of Professional Personnel for the Education of Handicapped Children. (Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963; P.L. 88-164; 77 Stat. 294; 20 U.S.C. 611-618 (Supp. V) 1963). Provides grants to public and nonprofit colleges and universities for expansion in the education of handicapped children.

Preschool and School Child Health. (1965 Amendments to Social Security Act; P.L. 89-97; 79 Stat. 286; 42 U.S.C. 729). Authorizes grants to private schools of medicine and teaching for health care and services to children.

Public Health Training—Traineeships. (Graduate Public Health Training Amendments of 1964; P.L. 88-497; 78 Stat. 613; 43 U.S.C. 242D (1964)). Provides grants to be used as tuition, fees, and allowances by students and institutions for public health training.

Project Grants for Graduate Training in Public Health. (Public Health Service Act, Sec. 309; P.L. 88-497; 78 Stat. 613; 42 U.S.C. 242(g)). Provides project grants for graduate training in public health to educational institutions.

Regional Medical Programs. (Heart Disease, Cancer, and Stroke Amendments of 1965; P.L. 89-239; 79 Stat. 926; 42 U.S.C. 299). Grants are available to nonprofit colleges and universities for the operation of regional medical programs of research and training.

Research in Maternal, Crippled Children and Child Health Services. (Maternal and Child Health and Mental Retardation Planning Amendments of 1963; P.L. 88-156; 77 Stat. 274; 42 U.S.C. 729 (1964)). Provides grants to public and nonprofit institutions of higher learning for the improvement of services in the field of maternal and child health services.

Research and Experimentation in Mass Medias. (National Defense Education Act; P.L. 85-864; 72 Stat. 1595; 20

U.S.C. 542). Provides for grants or contracts for research, experimentation, and dissemination of information by institutions of higher education in the field of communications media for educational purposes.

Research Fellowship Grants and Awards. (Public Health Service Act, Secs. 301(G), 433(A); P.L. 87-838; 76 Stat. 1073; 42 U.S.C. 241(c), 289(c)). Provides funds for the award of fellowships in health research or training either to the individual or directly to the educational institution.

School Library Resources, Textbooks, and Other Instructional Materials. (Elementary and Secondary Education Act of 1965; P.L. 89-10; 79 Stat. 36; 20 U.S.C. 821-827). Provides grants to States for acquisition of library and instructional materials which shall be made available to public and private elementary and secondary schools for the teaching of secular subjects.

Strengthening Developing Institutions. (Title III, Higher Education Act of 1965; P.L. 89-329; 79 Stat. 1229-1230; 20 U.S.C. 1051-1055). A program to assist accredited small colleges and universities in raising their academic qualities.

Student Assistance for College Work-Study Program. (Economic Opportunity Act of 1964; P.L. 88-452; 78 Stat. 513; 42 U.S.C. 2751-2756 (1964)). Provides part-time employment to students in institutions of higher learning who need employment to pursue courses of study.

Vocational Education Research Grants. (Vocational Education Act of 1963; P.L. 88-210; 77 Stat. 403; 20 U.S.C. 15AA, 15BB, 15AAA, 35-35N (Supp. V)). Provides grants to colleges, universities or other public or nonprofit institutions for research and training in vocational education.

Vocational Rehabilitation—Research, Training, and Demonstration. (Vocational Rehabilitation Act of 1920; P.L. 66-236; 41 Stat. 735; 29 U.S.C. 31-41 (1964), as amended). Provides grants to public and nonprofit private educational institutions in support of research and training projects, facilities, and centers in the field of rehabilitative medicine.

Vocational Rehabilitation Fellowships. (Vocational Rehabilitation Act; P.L. 89-333 Sec. 4A; 79 Stat. 1289; 29 U.S.C. 34(A)). Authorizes research fellowships for study and research at public and private institutions of higher education.

GENERAL SERVICES ADMINISTRATION

Disposal of Federal Surplus Real Property. (Federal Property and Administrative Services Act of 1949; P.L. 81-152; 63 Stat. 377; 50 U.S.C. 1622-1641). Provides price preference for nonprofit hospital and educational institutions for purchase of property to be used for health or educational services.

Donation of Federal Surplus Personal Property. (Federal Property and Administrative Services Act of 1949; P.L. 81-152; 63 Stat. 377; 50 U.S.C. 1622, 1641). Provides for donation of federal personal property to tax exempt universities, colleges or schools.

DEPARTMENT OF INTERIOR

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Research and Development Programs. (P.L. 87-295; 75 Stat. 628; 42 U.S.C. 1953). Grants and contracts are made with institutions of higher education, both public and private, for research and construction of research facilities.

STATE DEPARTMENT

The State Department supports educational activities to a considerable extent by a variety of programs for international exchange, improvement of cultural relationships and rendering of technical assistance to foreign countries. Basically, under the programs, students from this country are permitted to attend educational institutions abroad and students from foreign countries are permitted to attend educational institutions in this country. In either case payments are made to cover the cost of instruction and subsistence. For the education of foreign students in this country, the State Department makes contractual arrangements with the Institute of International Education, a private nonprofit organization in New York City, which in turn sponsors and makes specific arrangements for educating the foreign students. Training for a profession in religion is not financed but schools with religious affiliation are used. In performing this Service IEE gives financial aid to the students to cover tuition and other related student costs.

The State Department has also made direct financial arrangements with universities and charitable organizations in this country to provide student leader seminars, high school training for teenagers, and English language classes for foreign students. In addition, the State Department has a variety of exchange and other educational programs by which foreign individuals are able to study in this country with the assistance of other Government agencies and private educational organizations. Examples of programs are:

1. U. S. information and educational exchange programs (22 U.S.C. 1991, et seq)
2. Technical cooperation with foreign countries (22 U.S.C. 1891, et seq.).

DEPARTMENT OF AGRICULTURE

Commodity Distribution Program . (Agricultural Adjustment Act of 1949; 63 Stat. 670; 7 U.S.C. 1301). Any public or nonprofit private school or charitable institution serving needy persons is eligible for food commodities.

Cooperative Agricultural and Forestry Research Program. (76 Stat. 806; 16 U.S.C. 582a-582a-7). Makes research funds available to designated research institutions.

Forestry Research. (Forest Products Act; P.L. 85-934; 72 Stat. 1793; 16 U.S.C. 581). Provides grants for forestry research to universities and private research institutions.

National School Lunch Program. (National School Lunch Act; P.L. 87-823; 79 Stat. 944; 42 U.S.C. 1751 et seq.). Secretary of Agriculture makes funds available to States for distribution to public or private schools.

Special Milk Program for Children. (National School Lunch Act; P.L. 87-823; 79 Stat. 944; 42 U.S.C. 1751 et seq.). Funds of Commodity Credit Corp. are used to provide milk to private elementary and secondary schools.

Use of National Forests. (30 Stat. 36; 16 U.S.C. 479). Authorizes occupancy of 2 acres of national forest land for the erection of a school.

DEPARTMENT OF COMMERCE

Research and Development Programs. Grants and contracts for research and development, together with research facilities, are made with educational institutions both public and private.

ATOMIC ENERGY COMMISSION

(Atomic Energy Act of 1946; (P.L. 585) as amended, Secs. 3(A), 5(c)(2); 70 Stat. 1069; 42 U.S.C. 2051, 2111). Commission operates a variety of programs under which support is given for activities in institutions of higher education. These programs are grouped as follows:

Equipment, materials and services

Grants and loans of laboratory equipment, research reactors, and teaching aids are made to institutions.

Research and development programs

Grants or contracts are made with institutions of higher education for research and construction of research facilities in fields involving atomic energy.

Student fellowships

Payments are made to individuals to cover tuition and subsistence for study in nuclear science and engineering and for graduate work in the atomic energy aspects of the life sciences.

Training programs

Summer institutes for teachers and other training programs are offered in various fields relating to atomic energy.

HOUSING AND HOME FINANCE AGENCY

College Housing Program. (Housing Act of 1950; P.L. 81-475; 64 Stat. 77; 12 U.S.C. 1749). Provides long-term loans for construction of housing and other service facilities for students and faculty to institutions of higher education.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

University Research Program. (National Aeronautics and Space Act of 1958; P.L. 85-568, sec. 203(b)(5); 72 Stat. 429; 42 U.S.C. 2473(b)(5)). Research is conducted through contract with institutions of higher education in matters within the scope of interest of the National Aeronautics and Space Administration.

NATIONAL SCIENCE FOUNDATION

(National Science Foundation Act of 1950 (P.L. 507, 81st Cong.), secs. 3(a)(2), (3), (4) and (b), 11(c) and 14, as amended by P.L. 85-510, sec. 2, and P.L. 86-232, sec. 1; 42 U.S.C. 1862 (a), (2), (3), (4), and (b), 1870(c) and 1872a(b)). Pursuant to broad statutory authorizations to foster research and education in scientific fields, the National Science Foundation provides the following support for activities in institutions of higher education:

1. Fellowships for various types of graduate studies include allowance for tuition and subsistence and permit study at any accredited nonprofit institution of higher education in the United States or abroad.

2. Summer, academic year and inservice institutes are financed at institutions of higher education through stipened and tuition payments to improve the qualifications of high school and college teachers in science and mathematics. Stipends are paid without regard to the fact that the teacher is from a private school.

3. Special projects in science education are financed to provide the experimental testing and development of promising new ideas for the improvement of science instruction.

4. Programs are financed to improve course content and supplementary teaching aids in science.

5. Grants are made for basic research in the sciences, including funds for the use of graduate students as research assistants.

DEPARTMENT OF DEFENSE

Reserve Officer Training Programs. (39 Stat. 191; 10 U.S.C. 4382 (1916)). Authorizes the President to establish and maintain in civil educational institutions a training program leading to a commission in the armed forces. Payments are made to the institution in support and maintenance of such programs.

Training and Research Programs. (72 Stat. 1793; 42 U.S.C. 1891-1893 (1958)). Provides for research and training contracts *or* grants to be made with nonprofit institutions of higher learning both public and private. The Department of Defense has a number of training and research programs which finance activities at institutions of higher education. Research contracts fall under the procurement authority of each of the three branches of the Armed Forces. Thus, research is supported because of benefits to be received by the Defense Department and training is paid for because it improves the qualifications of mliitary and civilian personnel. Such arrangements have also been made on a grant basis to institutions pursuant to 42 U.S.C. 1891-1893, which specifies that the authority to contract for certain scientific research at nonprofit institutions of higher education shall be deemed to be authority to make grants.

VETERANS' ADMINISTRATION

Vocational Rehabilitation. (Veterans' benefits (P.L. 85-857), ch. 31, secs. 1503, 1504; 72 Stat. 1171; 38 U.S.C. 1503, 1504). Training is purchased from educational institutions of all types for the rehabilitation of war veterans with service connected disabilities. In addition, a subsistence allowance is paid the veteran.

Educational Benefits for World War II and Gorean Veterans. (Veterans' benefits (P.L. 85-857), ch. 33, sec. 1601 et seq.; 72 Stat. 1174; 38 U.S.C. 1601 et seq.). Educational benefits for veterans of World War II were included in P.L. 346, 78th Congress. This legislation has since been extended to provide educational benefits to veterans of subsequent conflicts.

War Orphans, Educational Assistance. (Veterans' benefits (P.L. 85-857), ch. 35, secs. 1701 et seq.; 72 Stat. 1193; 38 U.S.C. 1701 et seq.). This pragarm provides educational opportunities for children of wartime veterans who died from a service-incurred disease or injury. The student must be pursuing an approved program of education in an institution of higher education or in a vocational school below the college level. The Veterans' Administration is required to pay each educational institution $1 per month for each eligible person enrolled to assist in defraying the cost of preparing and submitting reports (38 U.S.C. 1765).

G.I. Bill of 1966. (Veterans Readjustment Benefits Act of 1966; P.L. 89-358; 80 Stat. 12; 38 U.S.C. 1651). Extends the benefits of higher education to eligible veterans through direct payments to the veteran.

SMALL BUSINESS ADMINISTRATION

Business Management Research. (Small Business Investment Act of 1958; P.L. 85-699; 72 Stat. 698; 15 U.S.C. 636(d)). Provides for grants for research and development in the field of business management and finance to colleges and universities.

MISCELLANEOUS PROGRAMS

Educational Costs of Congressional and Supreme Court Pages. (60 Stat. 839; 2 U.S.C. 88(a)(c). Provides for payments to private or parochial schools for the education of pages.

Part 2

Significant Programs of Major Industrial and Other States Aiding Nonpublic Education

New York. *Mandated Services Act* (Chapter 138 of the Laws of 1970) (N.Y. Educ. Law § —). Provides for an annual apportionment of state monies, payable directly to nonpublic schools for expenses of services for examination and inspection in connection with administration, grading, compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation. Payment for religious worship or instruction is expressly prohibited by the act.

Textbook Loan Act (N. Y. Educ. Law § 701) provides for free furnishing, to pupils enrolled in nonpublic schools, of secular textbooks designated for use in public schools or approved by public school authorities.

New York also provides student health service programs for nonpublic schools (N. Y. Educ. Law § 912); nonpublic school bus transportation (N. Y. Educ. Law § 3635); and special educational programs for handicapped children (N. Y. Educ. Law § 4407), neglected children (N. Y. Educ. Law § 4401), blind and deaf children (N. Y. Educ. Law § 4204).

Ohio. *Auxiliary Materials and Services Act* (Ohio Rev. Code § 333.06 (H)). Provides services and materials in nonpublic schools for: guidance, testing and counseling programs; programs for deaf, blind, emotionally disturbed, crippled and physically handicapped children. Also provides audio visual aids,

speech and hearing services, remedial reading programs, educational television services, programs for the improvement of the educational and cultural status of disadvantaged pupils.

Vocational Educational Training Program (Ohio Rev. Code § 3319.90). Requires public school districts to establish vocational training programs and to permit nonpublic school pupils to participate in such programs without cost.

State also provides nonpublic school bus transportation (Ohio Rev. Code § 3327.01) and driver education (Ohio Rev. Code § 3301.17) for nonpublic school students.

Pennsylvania. Pennsylvania Nonpublic Elementary and Secondary Education Act (24 Pa. Stat. Ann. § 5602 *et seq.*) provides for the purchase of educational services from nonpublic schools in four secular subjects: Mathematics, Physical Science, Physical Education, and Modern Foreign Languages. Reimbursement is made to the school only after it has rendered the secular educational services. Reimbursement is limited to: teacher salaries, textbooks, and instructional materials. Expressly prohibited in the teaching of subjects for which reimbursement is sought is the inclusion of any subject matter expressing religious teaching, or the morals or form of worship of any sect.

The state also provides nonpublic school bus transportation (Pa. Stat. Ann. Tit. 24 § 13-1361); nonpublic school nurse and dental services (Pa. Stat. Ann. Tit. 24 § 14-1402); and driver education (Pa. Stat. Ann. Tit. 24 § 15-1519.1)

Michigan. Teacher Salary Supplement Act (Mich. Stat. Anno. § 15.1919, *et seq.*). Provides for payment to nonpublic schools of 50 per cent of the salaries of

certified lay teachers who teach secular subjects in nonpublic schools. This percentage rises to 75 per cent after the first year of operation of the Act. Secular subjects are those subjects taught in the public schools and which shall expressly not include any course of instruction in religion or denominational tenets, doctrine or worship or the primary purpose of which is to inculcate such tenets, doctrine or worship. The appropriation for this Act can never exceed 2 per cent of the money appropriated for the public schools.

Auxiliary Services Act (Mich. Stat. Ann. § 15.3622). Provides the following auxiliary services to nonpublic schools: health and nursing services and examinations, street crossing guards, National Defense Education Act testing services, speech correction services, visiting teacher services for deliquent and disturbed children, school diagnostic services for mentally handicapped children, teacher counseling services for physically handicapped children, teacher consultant services for mentally handicapped and emotionally disturbed children, and remedial reading services.

The state also provides nonpublic school bus transportation (Mich. Stat. Ann. § 15.3592)

Connecticut. Nonpublic School Secular Education Act (Conn. Gen. Stat. Tit. —— § ——; Public Act 791, 1969). Provides for the purchase of secular educational services from nonpublic schools. The state reimburses the schools after the services have been rendered for 20 per cent of teachers' salaries and for purchase of textbooks ($10 per elementary student and $15 per secondary student). Reimbursement to a school rises to 50 per cent of a teacher's salary if one third of the students are from low income families and 60 per cent of a teacher's salary

if two thirds of the students are "educationally deprived" as that term is defined by Connecticut law. A "secular subject" is defined as "any course which is presented in the curricula of the public schools of this state". Expressly prohibited is "any instruction in religious or denominational tenets, doctrine or worship".

The state also provides nonpublic school bus transportation (Conn. Gen. Stat. Tit. 10, § 10-281), health services (Conn. Gen. Stat. Tit. 10, § 217(A)) and driver education (Conn. Gen. Stat. Tit. 10, § 10-281).

Rhode Island. Teacher Salary Supplement Act. (R.I. Gen. Laws Ann. § 16-51-3). Pays up to fifteen percent of the salaries of teachers who teach in nonpublic schools. Eligible teachers are those who teach subjects required by law to be taught in the public schools of the state and who receive the minimum salary required by state law for public school teachers.

State Textbook Act. (R.I. Gen. Laws Ann. § 16-23-2). Provides textbooks to nonpublic school children.

* * * *

Many other states provide various forms of aid to church-related education. Among these are textbooks (see Burns Ind. Stat. Ann. § 28-638 (Ch. 411, Acts of 1969); La. Rev. Stat. Ann. § 13:1579; N. M. Stat. Ann. § 77-13-1, *et seq.*; R. I. Gen.; Laws Ann. § 16-23-2) and bus service (see Cal. Educ. Code § 16806; 122 Ill. Ann. Stat. § 29-4); 6 Burns Ind. Stat. Ann. § 28-2805; Laws of Kas. 1947, C. 359, § 6; Ky. Rev. Stat. § 158-115; La. Rev. Stat. Ann. § 72-619; Me. Rev. Stat. Ann. §§ 20-220, 30-35104 (5) (Supp. 1965); Ma. Acts 1937, C. 185, § 146 A; 40 Laws of Mass. Ann. § 4; 71 Laws of Mass. Ann. § 368; 76 Laws of Mass. Ann. § 1; N. H. Rev. Stat. Ann. § 189.0; N. M. Stat. Ann. § 73-7-67; N.J.S.A. (Supp. 1965) § 18:14-10; Or. Rev. Stat. § 338.060, 1939, C. 352 § 1; R.I.G.L. 1938, C. 148 § 31.

SUPPLEMENT C

Public Regulation of Nonpublic Education in Pennsylvania

Nonpublic schools, including those which are religiously affiliated, ve for many years been subject to extensive regulation, both by the mmonwealth of Pennsylvania as well as the federal government.

tatute/Regulation	Description	Manner of Regulation
de*—Title	"An act relating to the public school system, including certain provisions applicable as well to private and parochial schools . . ."	Provides that many of the regulations applicable to public schools apply equaly to nonpublic schools.
	REGULATION AS TO CURRICULUM	
de—§ 1327	Compulsory attendance law.	Requires all children to attend a "day school in which subjects and activities prescribed by the State Council of Education are taught . . ."—gives broad power to State Council of Education to prescribe standards for curriculum in nonpublic schools.
gulations, State Board Education of Pennsylvia, Chapter 7, General rriculum Regulation, rch 14, 1969, § 7—210.	Issued pursuant to Code—§ 1327	Prescribes courses of study to be taught in all public and nonpublic elementary schools—subjects include, *inter alia*, the four subjects compensable under Act 109.
, § 7-232 § 7-233		Prescribes courses of study to be taught in all public and nonpublic secondary schools—and courses of study required for graduation for all secondary students—subjects include, *inter alia*, the four compensable subjects under Act 109.

*Public School Code of 1949, Act of March 10, 1949, P.L. 30, as amended, Pa. Stat. Ann. 1-101, *et seq.*

Statute/Regulation	Description	Manner of Regulation
Code—§ 1511	Statutory provision prescribing curriculum	Prescribes a list of approximately fifteen subjects taught "[i]n every elementary public and private school . . . "—also gives State Board of Education power to prescribe additional subjects.
Code—§ 1605	Statutory provision prescribing curriculum	Prescribes subject matter be integrated into social studies curriculum—and instruction to have as its purpose the instilling patriotism into children who come "to of our public and parochial schools."
School Administrators' Memorandum 93, Commonwealth of Pennsylvania, Department of Education,* June 13, 1968	Regulations prescribing content of courses of study	Prescribes that in each course of history (United States and Pennsylvania) taught in all public and private elementary schools there shall be taught the contributions made by Negroes and other racial and ethnic groups.
School Administrators' Memorandum 113, Commonwealth of Pennsylvania, Department of Education, August 28, 1968	Implementing regulation	Implements the aforesaid School Administrators' Memorandum 93.
	Regulation as to Approval	
Code—§ 1327	Compulsory attendance law	Gives plenary power to State Board of Education to approve schools.
Regulations, State Board of Education, March 14, 1969, Chapter 7 (supra) § 7-322	Issued pursuant to Code—§ 1327—approval of schools	Prescribes that "[a]ll schools—public, nonpublic, nonprofit and private shall be subject to periodic evaluation by Superintendent

* Prior to July 23, 1969, designated "Department of Public Instruction"

Statute/Regulation	Description	Manner of Regulation
		Education''—all secondary schools must be approved—standards governing approval: (a) those established by the Department of Education; (b) accreditation by the Middle States Association of Colleges and Secondary Schools.
School Administrators' Memorandum 89, Commonwealth of Pennsylvania, Department of Education, June 15, 1968	Advises of the issuance of document entitled ''Minimum Standards for Approval of Secondary School Programs'', Pennsylvania Department of Education, 1968	Prescribes minimium standards or criteria which all schools (public and non-public) must meet for approval—these relate to the following areas: Program of studies; library quality and quantity; certification of professional employees; provision for exceptional children; medical, dental and school nurse service; attendance service; inservice training of professional employees; textbooks; instructional material; audio-visual equipment; guidance service; occupational, vocational, and technical education; administrative or clerical service; pupil—teacher ratio; co-curricular activities; instructional planning of time for professional employees.
Regulation, State Board of Education, March 14, 1969, Chapter 7 (supra) § 7-323	Significance of school approval	Certification that diplomas issued by approved nonpublic schools constitute valid pre-professional credentials.
REGULATION AS TO ATTENDANCE AND LENGTH OF SCHOOL DAY		
Code—§ 1317	Compulsory attendance law	Prescribes that children shall attend nonpublic schools for the same length of time the public schools are in session.

Statute/Regulation	Description	Manner of Regulation
Code—§ 1501	Regulates number of school days	Requires public schools to be in session for a minimum of 180 days—thus nonpublic schools must be in session same length of time.
School Administrators' Handbook, Department of Public Instruction, Commonwealth of Pennsylvania, 111-000, August 5, 1968	Regulation implementing Code—§ 1501	Prescribes regulations for length of school year and school day; defines pupil instruction time and those activities not included; prescribes minimum class periods and hours.
Code—§ 1502	Relates to days schools are to be closed	Prescribes minimum number of holidays for all schools (public and nonpublic).
REGULATION AS TO REPORTING		
Code—§ 1332	Reports of enrollments, attendance and withdrawals	Requires nonpublic school administrators to furnish reports on attendance, absences, etc., of all students enrolled in nonpublic schools.
Regulation, State Board of Education, Commonwealth of Pennsylvania, Chapter 7 (supra) § 7-324	Annual Reports for continuing approval	Requires each secondary nonpublic school to submit annual report in such form as determined by the Department of Education. Report is reviewed for compliance with all Regulations. Approval of school may be revoked for failure to report.
REGULATION AS TO PENALTIES		
Code—§ 1333	Failure to comply with compulsory attendance law	Prescribes prosecution and penalty for parents or guardians who refuse to comply.
Code—§ 1355	Nonpublic school officials—failure to comply with code.	Prescribes prosecution and penalty for failure of nonpublic school administrators and teachers to comply with provisions of Code.

Regulation as to Health and Sanitation

Statute/Regulation	Description	Manner of Regulation
ode—§ 1303	**Vaccination**	
chool Administrators' andbook, Pennsylvania epartment of Education, 13-110, March 20, 1970;		Requires all students to be vaccinated against smallpox, imposes duties on school administrators relative to enforcement.
ules and Regulations, Commonwealth of Pennsylvania, Department of Health, hapter 3, Article 311.		
ode—§ 1402, *et seq.*	School health services (formerly known as Environmental Health Act)	Provides for medical, dental and school nurse services for all school children (including nonpublic).
ules and Regulations, Commonwealth of Pennsylvania, Department of Health, Chapter 3, Article 322	Health services	Regulation to implement health services.
ules and Regulations, Commonwealth of Pennsylvania, Department of Health, Chapter 3, Article 333.		Regulations relating to school nurse services.
ct of April 23, 1956, P.L. 1510, as amended, 35 Pa. tat. Ann. 521.1 *et seq.*	Disease Prevention and Control Law of 1955	Imposes requirements as to sanitation, reporting, etc., on nonpublic school administrators.
ules and Regulations, Commonwealth of Pennsylvania, Department of Health, Chapter 3, Article 355	Implements aforesaid statutory provision	
ct of April 9, 1929, P.L. 177, as amended, 71 Pa. tat. Ann. *et seq.*	The Administrative Code	Contains various provisions imposing requirements for health and sanitation in institutions, including nonpublic schools.
ules and Regulations, Commonwealth of Pennsylvania, Department of Health, Chapter 4, Articles 412, 416, 442.	Rules and Regulations implementing the aforesaid statutory provision.	Imposes regulations relating to such matters as food services, waste and sewage disposal, insect and rodent control, swimmiing pools, etc. —provides for inspections.

Statute/Regulation	Description	Manner of Regula
Act of January 8, 1960, P.L. 2119, as amended, 35 Pa. Stat. Ann. 4001, *et seq.*	Air Pollution Control Act	Permits state authorit promulgate regulation air pollution control- lation can include sch permits entry and i tion of schools.
Rules and Regulations for Industrial Sanitation, 1966 Edition, Commonwealth of Pennsylvania, Department of Labor and Industry		Imposes extensive re tions relating to matte cleanliness—such as l tories (number, locati ventilation, wash basi dressing facilities, etc.
REGULATION AS TO BUILDING AND CONSTRUCTION		
Code—§ 734	Heating and ventilation requirement	Requires State Board of ucation to prescribe st ards for heating and ven tion of all school buildi
Act of April 27, 1927, P.L. 465, as amended, — Pa. Stat. Ann.		
Rules and Regulations for Protection from Fire and Panic, 1968 edition, Commonwealth of Pennsylvania, Department of Labor and Industry.	Safety requirements	Imposes extensive req ments for the construc and maintenance of sch —includes every facet o school building, includi type of materials to be u in construction, quality a quantity of fire-escapes stair wells, windows, fi alarm systems, class ro size and number of pup gymnasium, auditorium, a —provides for inspectio

Regulation as to Transportation

Statute/Regulation	Description	Manner of Regulation
...April 29, 1959, P.L. ... Pa. Stat. Ann. 101	The Vehicle Code	Prescribes extensive regulation over all aspects of pupil transportation, including transportation systems operated by nonpublic schools. Aspects regulated include: general qualifications of school bus operators, including age, fitness, competency, physical condition; minimum standards for school buses, including chasis, axles, braking system, electrical system, heating system, tires, etc.; bus body, emergency doors; safety features, such as use of flashing red lamps; special equipment for transporting handicapped children; registration plates and license fees; receiving and discharging passengers; number of passengers; disciplinary power and duties of school bus operators.
...lations, State Board ...ducation, Chapter 4, ... Transportation, ...t 30, 1967	Regulations relating to operation of school buses	

Regulation as to Labor Relations

Statute/Regulation	Description	Manner of Regulation
Act of January 17, 1968, P.L. — No. 5, 43 Pa. Stat. Ann., 333.101	Minimum Wage Act of 1967	Prescribes minimum w to be paid to certain per nel in nonpublic schools
Pennsylvania Minimum Wage Regulations, August 15, 1969, Commonwealth of Pennsylvania, Department of Labor and Industry	Implements aforesaid statutory provision	
Act of July 23, 1970, P.L. — No. 195, — Pa. Stat. Ann. —.	Public Employee Relations Act of 1970	Grants to all employees than clergymen and thos a religious profession— *inter alia*, "any nonpro . . . religious . . . edu tional . . . institution" right to organize (form unions) and to freely ch their representatives; re quires nonpublic schools negotiate and bargain w employee organizations; pr scribes employee rights; pr scribes unfair labor pra tices; confers the right strike and to picket; confe jurisdiction upon the Pen sylvania Labor Relations Board over labor disput between nonpublic school employees and nonpublic schools.

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SUPPLEMENT D

COMMONWEALTH OF PENNSYLVANIA

July 1, 1970

PNESEA Informational Memorandum

Requesting Agencies; Organizations

Vincent J. McCoola, Director
Office for Aid to Nonpublic Education
Department of Education

On June 1, 1970, the Office for Aid to Nonpublic Education successfully completed the first administrative cycle in the implementation of Act 109. As a result of this milestone in aid to nonpublic education, the Office for Aid to Nonpublic Education has received many inquiries concerning the status and continued implementation of the Pennsylvania Nonpublic Elementary and Secondary Education Act. In order to service requesting agencies in a uniform manner, it was decided that a capsulized summarization of the year's activities developed in memorandum form would provide a vehicle whereby we might service requesting organizations.

The Commonwealth of Pennsylvania and this Office now enters the third year of operation under PNESEA, a program that has been marked by excellent cooperation between the public and nonpublic educational sectors in Pennsylvania. The entire administrative structure was developed on the premise of cooperation and professional enthusiasm which was necessary because the Office for Aid to Nonpublic Education and Act 109 had no precedent since it was a pioneering effort.

The second operational year of PNESEA, just completed, witnessed the participation of 1,178 nonpublic institutions in the program resulting in the purchase of secular educational services for 535,215 Pennsylvania resident students.

This Office has adhered to its May 15 deadline for the submission of approved claims from participating institutions, and the staff is currently processing these

claims in preparation for the next quarterly payment on September 1, 1970. This payment will represent the first quarterly payment to participating institutions for the operational or academic year of 1969-1970.

As we conclude the second year of administering the Pennsylvania Nonpublic Elementary and Secondary Education Act, two observations are readily evident:

1. The administration of Act 109 has operated smoothly with excellent educational rapport and an excellent record of cooperation between Commonwealth education officials administering the Act on behalf of the Department of Education and the administrators of more than 1,100 nonpublic schools in this State.

2. Evidence and substantiating correspondence describes Act 109 as an instrument that provided substantial aid to the total spectrum of education in Pennsylvania.

In support of the initial conclusion, it must be pointed out that this Office in 1968 established the administrative machinery capable of effectively and economically consummating the purchase of secular educational service for nonpublic institutions in the Commonwealth of Pennsylvania. An appreciable amount of effort preceded the establishment of the functional administrative unit, and the procedure has been documented by the joint preparation of Rules and Regulations, position papers, instructional memoranda, and the conduct of instructional seminars in six geographic sections of the Commonwealth of Pennsylvania.

In order to assist the Director of the Office for Aid to Nonpublic Education, the Secretary of Education elected to appoint an Ad Hoc Advisory Committee whose membership includes:

Mr. John R. Batley, Business Manager
Westtown School

Dr. William W. Brickman
University of Pennsylvania

Mr. Darl Callen, Director
Bureau of Public Assistance Disbursements
Treasury Department

Dr. William L. Charlesworth, Director
Bureau of Faculty and Student Services
Department of Education

Monsignor Homer C. DeWalt
Diocesan Superintendent of Erie Schools

Benjamin Frank, Esq.
Deputy Attorney General
Department of Justice

Monsignor Edward T. Hughes
Diocesan Superintendent of Philadelphia Schools

Mr. Norrece T. Jones, Business Manager
Cheyney State College

Dr. John E. Kosoloski, Director
Bureau of General and Academic Education
Department of Education

Mr. M. Stanford Lapayowker, Principal
Lincoln College Preparatory School

Rabbi Abba Leiter
Pittsburgh, Pennsylvania

Mr. Mervin E. Manning, Assistant Comptroller
Bureau of School Accounting and State Subsidy
Department of Education

Mr. James H. McK. Quinn, Headmaster
The Episcopal Academy

Mr. John F. Bray, Director
Bureau of School Audits
Department of the Auditor General

Mr. James O'Brien, Regional Supervisor
Bureau of School Audits
Department of the Auditor General

The Office for Aid to Nonpublic Education constantly endeavors to expose the Committee to problems before developing policy decisions. Meetings are open to discussion by the membership and professional good judgment is always

considered. Since the membership of the Ad Hoc Advisory Committee represents a composite cross section, together with Department of Education professional expertise, these deliberations result in procedures which are compatible, effective, professional, and within the framework of the Act, a sincere attempt to fairly and properly implement the legislation.

Despite the early difficulties encountered in establishing the Office, after the basic foundations of good management were applied and the professional advice of many sectors sought and received, the current administration of PNESEA is neither cumbersome nor oppressive nor static. Our initial effort of good administrative service was rewarded by a minimal number of complaints directed to the operation of the program. It may be generally concluded, as evidenced in the Philadelphia Inquirer article dated June 8, 1970, that the administration of PNESEA was "tough but fair".

The instructional seminars launched during the first year of operation dissipated any overt criticism since a sincere effort was made to educate "participating administrators in the new experience of completing government forms". An appreciable amount of time was spent in policing, while processing the forms; and a reasonable amount of attention was given to mechanical details. The second year of operation resulted in a smooth submission cycle and processing program.

It may be said that the present administrative structure of PNESEA is a smoothly functioning operation with little or no extenuating criticism. A certain portion of administrative time is directed to future planning, programming, and improvement.

Relative to the second conclusion, we have been apprised by both the nonpublic school administrators and various interested citizens and organizations of the Commonwealth regarding the substantial educational advance which this epochal program has marked. Because of the quality incentives and program stimulation written into PNESEA, evidence of upgraded nonpublic education in some needed instances has been noted resulting in much favorable comment.